(34)

No. 89-1391-CFX
Status: GRANTED

Docketed:
March 1, 1990

Vide:
89-1392

Title: Irving Rust, etc., et al., Petitioners
v.
Louis W. Sullivan, Secretary of Health and Human Services

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Pine,Rachael N., Tribe,Laurence H.

Counsel for respondent: Solicitor General

1/11: Ord. granting ext. of time to file, to and incl. 3/1/90, by Marshall, J. (CITED); 40 printed copies of pet. and sep. app. mailed 3/1 and recd. 3/2.

Entry	Date	Note	Proceedings and Orders
1	Jan 10 1990	G	Application (A89-507) to extend the time to file a petition for a writ of certiorari from January 30, 1990 to March 1, 1990, submitted to Justice Marshall.
2	Jan 11 1990		Application (A89-507) granted by Justice Marshall extending the time to file until March 1, 1990.
3	Mar 1 1990	G	Petition for writ of certiorari filed.
4	Mar 1 1990		Appendix of petitioner filed.
5	Mar 27 1990		Supplemental brief of petitioner Irving Rust, et al. filed.
7	Mar 27 1990		Order extending time to file response to petition until May 5, 1990.
8	May 4 1990		Brief amici curiae of American Public Health Assn., et al. filed. VIDED.
9	May 7 1990		Brief of respondent Sullivan, Sec. of HHS in opposition filed. VIDED.
10	May 8 1990		DISTRIBUTED. May 24, 1990
11	May 9 1990	X	Brief amici curiae of Ohio, et al. filed. VIDED.
12	May 29 1990		Petition GRANTED. The case is consolidated with 89-1392, and a total of one hour is allotted for oral argument.
			**********
14	Jun 6 1990		Order extending time to file brief of petitioner on the merits until July 27, 1990.
15	Jun 8 1990	D	Motion of Alan Ernest for leave to represent children unborn and born alive filed.
16	Jun 8 1990	D	Motion of Legal Defense for Unborn Children for leave to file a brief as amicus curiae filed.
17	Jun 25 1990		Motion of Alan Ernest for leave to represent children unborn and born alive DENIED.
18	Jun 25 1990		Motion of Legal Defense for Unborn Children for leave to file a brief as amicus curiae DENIED.
19	Jul 27 1990		Brief amicus curiae of Assn. of the Bar of City of New York filed. VIDED.
20	Jul 27 1990		Brief amici curiae of American Library Association, et al. filed. VIDED.
21	Jul 27 1990		Brief amici curiae of Representatives Patricia Schroeder, et al. filed. VIDED.
22	Jul 27 1990		Brief amicus curiae of Twenty-Two Biomedical Ethicists

2 pp

No. 89-1391-CFX

Entry	Date	Note	Proceedings and Orders
			filed. VIDED.
23	Jul 27 1990		Brief amici curiae of Alaska, et al. filed. VIDED.
24	Jul 27 1990		Brief amici curiae of American College of Obstetricians and Gynecologists, et al. filed. VIDED.
25	Jul 27 1990		Brief amici curiae of American Public Health Association, et al. filed. VIDED.
26	Jul 27 1990		Brief amici curiae of Commonwealth of Massachusetts, et al. filed. VIDED.
27	Jul 27 1990		Brief amici curiae of NAACP Legal Defense Fund, et al. filed. VIDED.
28	Jul 27 1990		Brief amici curiae of National Association of Women Lawyers, et al. filed. VIDED.
29	Jul 27 1990		Brief amici curiae of NOW Legal Defense and Education Fund, et al. filed. VIDED.
30	Jul 27 1990		Joint appendix filed. VIDED.
31	Jul 27 1990		Brief of petitioners Dr. Irving Rust, et al. filed.
32	Jul 27 1990		Brief amici curiae of Planned Parenthood Federation of America, et al. filed. VIDED.
33	Jul 27 1990		Lodgings received. (10 copies).
34	Aug 22 1990		Record filed.
		*	Certified original record received from USCA 2.
35	Aug 22 1990		Brief amici curiae of American Life League, et al. filed. VIDED.
36	Sep 7 1990		Brief amicus curiae of American Academy of Medical Ethics filed. VIDED.
37	Sep 7 1990		Brief amici curiae of Senator Gordon J. Humphrey, et al. filed. VIDED.
38	Sep 7 1990		Brief amici curiae of National Right to Life Committee, Inc., et al. filed. VIDED.
39	Sep 7 1990		Brief amicus curiae of Knights of Columbus filed. VIDED.
40	Sep 7 1990		Brief of respondent Sullivan, Sec. of HH&S filed. VIDED.
41	Sep 7 1990		Brief amicus curiae of American Physicians and Surgeons filed. VIDED.
42	Sep 7 1990		Brief amicus curiae of United States Catholic Conference filed. VIDED.
43	Sep 7 1990		Brief amici curiae of Feminists for Life, et al. filed. VIDED.
44	Sep 7 1990		Brief amici curiae of Catholics United For Life, et al. filed. VIDED.
45	Sep 19 1990		CIRCULATED.
46	Sep 26 1990		SET FOR ARGUMENT TUESDAY, OCTOBER 30, 1990. (1ST CASE)
48	Sep 26 1990		SET FOR ARGUMENT TUESDAY, OCTOBER 30, 1990. (1ST CASE)
47	Oct 10 1990	X	Reply brief of petitioners Dr. Irving Rust, et al. filed. VIDED.
49	Oct 30 1990		ARGUED.

(1) No. 89-1391

Supreme Court, U.S.
FILED
MAR 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DR. IRVING RUST, on behalf of himself, his patients, and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RACHAEL PINE
(*Counsel of Record*)
JANET BENSHOOF
LYNN PALTROW
KATHRYN KOLBERT
LOUISE MELLING
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800 ext. 520

NORMAN SIEGEL
ARTHUR EISENBERG
New York Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 382-0557

Of Counsel:

LAURIE ROCKETT
Hollyer, Jones, Brady, Smith, Troxell, Barrett & Chira
342 Madison Avenue
New York, New York 10173
(212) 818-1110

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QUESTIONS PRESENTED

1. Whether regulations promulgated under Title X of the Public Health Service Act that prohibit abortion counseling, information, and referral in federally funded family planning programs, while simultaneously requiring the provision of information to "protect the health of . . . [the] unborn child" and referral to prenatal care providers that "promote the welfare of . . . [the] unborn child," impermissibly discriminate on the basis of viewpoint in violation of the First Amendment.

2. Whether regulations that require physical as well as financial separation between services provided by and those prohibited under Title X, as construed by the Department of Health and Human Services, impermissibly burden the ability of petitioners to provide abortion counseling, information, and referral with non-Title X funds in violation of the First Amendment.

3. Whether regulations that require health professionals working in Title X programs to provide their patients with incomplete and medically inappropriate information regarding a subject crucial to an informed choice between terminating a pregnancy and carrying it to term violate the Fifth Amendment.

4. Whether regulations that prohibit abortion counseling, information, and referral in Title X programs and require such programs to be physically as well as financially separate from these newly "prohibited" activities, as determined by the Secretary, are consistent with the language and intent of Title X and are otherwise within the Secretary's authority.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Second Circuit are those in the caption (appellants in C.A. No. 88-6206) as well as the State of New York, the City of New York, and the New York City Health & Hospitals Corporation (appellants in C.A. No. 88-6204). The three governmental appellants in C.A. No. 88-6204 petition separately for certiorari.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-_____

DR. IRVING RUST, on behalf of himself, his patients, and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit entered on November 1, 1989.

OPINIONS BELOW

The decision of the district court is reported at 690 F. Supp. 1261 (S.D.N.Y. 1988) (9-32a).[1] The decision of the court of appeals is reported at 889 F.2d 401 (2d Cir. 1989) (35-67a). The Second Circuit granted an injunction pending review on certiorari by this Court on November 21, 1989 (68-69a).

BASIS FOR JURISDICTION

The final judgment of the court of appeals was entered on November 1, 1989. On January 11, 1990, Justice Marshall signed an order extending the time to file a petition for certiorari to and including March 1, 1990. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C.A. § 1254(1) (West Supp. 1989).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law . . . abridging the freedom of speech . . . .

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

1 The opinion is reprinted in the Appendix to Petitions for Writ of Certiorari. For the convenience of the Court, a single appendix accompanies the petition of Dr. Irving Rust *et al.* and the separate petition of the State of New York *et al.* Citations to this Appendix are made to the page number therein as "(_____a)." Citations to other materials in the record below will be to "(_____A)" (referring to the joint appendix filed in the Second Circuit) or by name and date of document, if in the record but not included in either appendix. All references to affidavits and declarations in the record will be to "Name ¶ _____" with appendix page, if any.

Title X of the Public Health Service Act, 42 U.S.C. § 300(a) (1982):

> The Secretary is authorized to make grants to and enter into contracts . . . to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services . . . .

Title X of the Public Health Service Act, 42 U.S.C. § 300a-6 (1982):

> None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.

Grants for Family Planning Services, 42 C.F.R. §§ 59.2, 59.5, 59.7, 59.8, 59.9, 59.10 (text appears at 1-8a).

STATEMENT OF THE CASE

A. The Title X Program and the Challenged Regulations

Title X of the Public Health Service Act, 42 U.S.C. §§ 300-300a-41 (1982) ("Title X" or "the Act"), subsidizes the creation and operation of clinical programs providing critical medical services to a desperately needy population in New York State[2] and across the nation.[3] Though the areas

2 Petitioner Medical and Health Research Association of New York City ("MHRA") is one of two direct grantees of Title X funds in New York State. Fink ¶ 3 (533A); Gesche ¶ 4 (75a). The New York State Department of Health ("NYSDOH") is the other direct grantee. Gesche ¶ 4 (75a). Together, MHRA and NYSDOH subgrant Title X funds in excess of $8 million to 40 delegate agencies statewide. Gesche ¶¶ 4-5 (544-45A); Fink ¶ 4 (533-34A). Petitioners Planned Parenthood of New York City, Inc., Planned Parenthood of Westchester/Rockland, and Health Services of Hudson County, New Jersey, are among these delegate agencies. Doctors Rust and Padawer are medical directors at provider agencies.

3 Title X is the largest source of federal support for family planning and reproductive health care, funding over 3900 clinics nationwide and serving nearly five million low-income women per year. *See* Morley ¶ 6 (78-79a). The overwhelming majority of these women are poor, most having incomes below 150% of the poverty line, Fink ¶ 3 (533A); Gesche ¶ 6 (545A); a sub-

served by the program have an acute need for medical care and information,[4] Title X clinics are frequently the only providers of reproductive health care or even of basic medical services for low-income women living in these communities. United States Department of Health and Human Services, *Program Guidelines for Project Grants for Family Planning Services* § 9.4 (1981) (hereinafter "1981 Guidelines") (39A); *see* Fink ¶ 10 (85a); Drisgula ¶ 18 (89a); Potteiger ¶ 16 (91a); Tiezzi ¶ 8a (726-27A).

Recognizing that Title X projects would be the "frontline" in the battle against disease, Congress intended clinics receiving Title X funds to function as an entry point into the health care system, by identifying undiscovered health problems and by offering referrals for all treatment needs. *See* 116 Cong. Rec. 37,370 (1970) (statement of Rep. Bush) (222A); *see generally infra* Point III(A). For this reason, the Department of Health and Human Services ("HHS") requires Title X clinics to provide general medical care[5] and

stantial percentage are adolescents, Gesche ¶ 7 (over 30%) (545A); and many are Black or Hispanic, *e.g.*, Fink ¶ 3 (533A); Rust ¶ 5 (699-700A).

4 The communities served by the program suffer from disproportionately high rates of teenage pregnancy, infant mortality, and sexually transmitted disease. Joseph ¶¶ 2-3 (613-14A); Bennett ¶ 7 (496A); Coombs ¶ 10 (Nov. 10, 1989); Moran ¶ 4 (Feb. 5, 1988). In the urban areas served by New York providers, the percentage of those infected with AIDS is among the highest in the nation. *See* Joseph ¶¶ 7-8 (611A); Minkoff ¶¶ 5-6 (647A). One in every 60 women giving birth in New York City is HIV-infected, with the rate rising to one in 50 in Manhattan and the Bronx. Gesche (Exh. F) (New York State Department of Health, *Newborn Seroprevalence Study* (1988)) (563A). Thirty to fifty percent of the children born to these women will be infected. *Id.* In New York State, in 1988 alone, 2300 HIV-positive women were expected to give birth, with approximately 1000 of those infants being infected by the virus. Gesche ¶ 17 (549-50A).

5 The most recent Title X guidelines, for example, require clinics to provide a general physical examination that includes an examination of blood pressure, thyroid, heart, lungs, and breasts (with self-exam instruction). 1981 Guidelines at § 8.3 (35-36A). Clinics must also provide diagnostic tests such as pap smears and gonorrhea cultures, *id.*, and offer counseling, education, and referral for AIDS. *See* Memorandum from Nabers Cabaniss, Deputy Assistant Secretary for Population Affairs, to Regional Health Administrators (Dec. 8, 1987) (Exh. G to Complaint, *Rust v. Bowen*, 690

referral for all services not provided by the clinic, in addition to basic family planning services. *See* 42 C.F.R. § 59.5(b)(1) (1988); *see infra* Point III. These requirements continue to date.

On February 2, 1988, HHS promulgated amendments to then current Title X regulations purporting to interpret and implement § 1008 of the Act.[6] *But see infra* Point III. While retaining the requirements described above, these new regulations fundamentally alter the nature of the Title X program by singling out pregnancy as the only condition for which medical care, advice, and information is sharply restricted.[7]

Specifically, § 59.8 of the regulations prohibits Title X projects from providing a pregnant woman, regardless of her life or medical circumstances, with "counseling concerning the use of abortion . . . or . . . referral for abortion." § 59.8(a)(1), (3a). The projects are required, however, to furnish every pregnant woman with a list of all prenatal care providers that "promote the welfare of . . . [the] unborn child."[8] § 59.8(a)(2), (b)(4), (3-4a). The list must include all

F. Supp. 1261 (S.D.N.Y. 1988) (No. 88-0702)). Recommended services include treatment for minor gynecologic problems, genetic screening and referral, and general "health maintenance services . . . directed toward health promotion and disease prevention." 1981 Guidelines at §§ 9.1-3, 9.4 (39A). The 1981 Guidelines also specifically required abortion counseling and referral as well as counseling and referral for adoption and prenatal care services. *Id.* at § 8.6 (71a).

6 Section 1008, codified at 42 U.S.C. § 300a-6, excludes "abortion . . . as a method of family planning" from the broad range of services funded. *See infra* Point III(A).

7 Pregnancy is one of the most prevalent conditions to be diagnosed and discussed at Title X clinics. Indeed, one of the reasons most frequently given for an initial visit to a Title X clinic is a "pregnancy scare." Bennett ¶ 11 (498A); Drisgula ¶ 8 (513A).

8 The only exception to the mandatory referral for prenatal care arises when "emergency care is required," at which time "the Title X project shall be required only to refer the client immediately to an appropriate provider of emergency medical services." § 59.8(a)(2), (3a). The exception applies only where continued pregnancy would be life-threatening. *E.g.*, 53 Fed. Reg.

"providers who do not perform abortions" but exclude those "whose principle business is the provision of abortions."[9] § 59.8(a)(3), (b)(3), (b)(4), (3-4a). Regardless of whether the patient is thirteen years old, a victim of rape, or infected with AIDS,[10] the Title X health care professional "must" provide her "with information necessary to protect the health of . . . [the] unborn child." § 59.8(a)(2), (3a). Many patients do not know that abortion is a safe, legal option. Drisgula ¶ 20 (518A); S. White ¶ 13 (87a); Merrens ¶ 15 (95a).[11] However, even if a patient knows that abortion is an option and asks for information about the procedure or its availability,[12] the Title X physician or counselor is constrained from saying more than that "the project does not consider abortion an

2922, 2937 (1988) (preamble to regulations) ("Title X providers are in fact obligated to provide referrals for immediate and appropriate medical care when confronted with a *life-threatening* medical condition.") (emphasis added) (332A).

9 This requirement effectively eliminates most abortion providers by excluding from the list all providers that would be accessible and affordable to low-income women. Henshaw ¶¶ 3-4 (82a). Seventy percent of abortions nationally and 73.5% of those in New York are performed at clinics that might be considered to "principally" provide abortions. Henshaw ¶ 4 (82a). Only hospitals, which are geographically or economically inaccessible, and private practitioners, who generally do not accept Medicaid or provide reduced-cost care, could be included on the list. Drisgula ¶ 28 (520A); Gordon ¶ 7 (587-88A). Moreover, the Title X physician is prohibited from identifying those providers on the list, if any, that perform abortions. *See* § 59.8(a)(3), (3a).

10 One rural project estimated that in a single year it referred for abortion five 10-14 year-old girls, at least one or two women with AIDS, and one or two women who had been raped. Potteiger ¶¶ 9-10 (Dec. 15, 1987). Another rural program reported 15 patients in one year whose pregnancy resulted from rape. Drisgula ¶ 24 (90a).

11 This lack of information and education about abortion is vividly illustrated by petitioner Dr. Rust's relatively recent encounter with a patient in the South Bronx who had tried to self-abort because "she didn't know that she could obtain an abortion, or where information about abortions was available." Rust ¶ 15 (92a).

12 At some Title X programs as many as 72% of patients diagnosed as pregnant request referrals for abortion services. Klepper ¶ 17 (Feb. 5, 1988).

appropriate method of family planning . . . and that [it] can help her to obtain prenatal care and necessary social services . . . ." § 59.8(b)(5), (5a).

Further, § 59.10 prohibits activities that "encourage, promote or advocate abortion." (6a). This prohibition extends so far as to bar clinics from making appointments for pregnant clients with abortion clinics, § 59.10(b)(2), (6a); offering clients a pamphlet, § 59.10(b)(1), (6a), or even a section of the yellow pages advertising a facility providing abortions, *see New York v. Sullivan* (Cardamone, J., concurring) (61a); (Kearse, J., dissenting) (64-65a); making available books that describe the abortion procedure, § 59.10(a)(5), (6a); or discussing abortion in lectures or workshops on sex education, family planning, or reproductive health, § 59.10(a)(2), (6a). Section 59.10 thus prevents Title X recipients from engaging in any nonpejorative discussion of abortion.

Finally, § 59.9 requires Title X programs to be "physically and financially separate" from "prohibited" activities. (5a). The existence of separate Title X and non-Title X personnel, as well as of separate treatment, consultation, examination, and waiting rooms, is to be considered in determining the "integrity and independence" of Title X projects. § 59.9(a)-(d), (5-6a). The requirement is so severe that it will be difficult and often impossible for recipients of Title X funding to continue to counsel about and refer for abortion even with their non-Title X funds. *See infra* Point II(A)(2).

The impact of the regulations on the women and communities that Congress sought to serve will be severe, a fact not disputed by the Secretary and accepted as true by both the district court, (10a), and the court of appeals, (41a). Some patients will construe the required silence of their Title X physician on the subject of abortion as a message that abortion is neither medically indicated nor appropriate for them. Sammons ¶ 16 (721-22A). Misled by their Title X physician, these women may not seek further counseling and thus will never learn that they have other, sometimes more appropriate, options. Merrens ¶ 17 (641A). For women with AIDS, diabetes, and other diseases that may be aggravated by continued pregnancy, the impact will be particularly severe.

Rosenfield ¶¶ 9-15 (680-84A); Minkoff ¶¶ 7-9 (647-48A); Morley ¶ 17 (664A); Merrens ¶ 17 (641A). Some women will carry unwanted pregnancies to term, with lifelong and often devastating consequences. Morley ¶ 16 (663-64A); Rust ¶ 13 (703-04A); P. Roe ¶ 3 (96a); L. Roe ¶ 5 (97a).

Even those women who seek further information about abortion will have to call provider after provider on the referral list until they stumble upon one that provides abortions or referrals. Some women, particularly teens, may be completely deterred by the frustration of runaround referrals.[13] M. White ¶ 6 (93-94a); Morgan ¶ 8 (86a); Klepper ¶ 20 (Feb. 5, 1988); Bennett ¶ 21 (501A). Those who find an abortion provider will have experienced substantial delay. Merrens ¶¶ 16-17 (640-41A). For some women, delay will eliminate the abortion option, Morley ¶ 13 (662-63A), while for others the delay will increase associated medical risks and costs.[14] *E.g.*, Gordon ¶ 12 (590A); Henshaw ¶¶ 16, 21 (601, 603-04A). In sum, by requiring the provision of incomplete and misleading information to patients relying exclusively on government-subsidized health care, the regulations will leave many women worse off than if there had been no Title X program at all. Katz ¶ 18 (624A); *see also* Pasternack ¶ 14e (674A); Potteiger ¶ 18 (91a).

B. History of the Litigation

Petitioners initiated this action on February 2, 1988. The complaint, which asserted jurisdiction under 28 U.S.C. §§ 1331, 1343, 1361 (1982) and 5 U.S.C. §§ 702, 704 (1982), stated claims for relief under Title X, the Administrative Procedure Act, and the First and Fifth Amendments to the United States Constitution. On February 19, the district court granted petitioners' motion for a preliminary injunction, *New York v. Bowen*, Nos. 88-0701, 0702 (S.D.N.Y.) (order dated Mar. 1, 1988) (427-28A), but on June 30, the court granted summary judgment in favor of the Secretary and dismissed the complaint, (9-33a). Notwithstanding the district court's decision, the Secretary voluntarily extended petitioners' Title X funding under the terms of the preexisting regulations until early in the fall of 1989. Pine ¶¶ 4-8 (Nov. 13, 1989). Petitioners then moved for an injunction pending decision by the Second Circuit, which was granted on September 5, 1989. (33-34a).

13 Some of these women will turn to unlicensed providers or attempt self-abortion. *E.g.*, Rust ¶¶ 11, 15 (92a). Others, particularly teenagers, may run away from home to conceal pregnancies or may become suicidal. Morgan ¶ 8 (86-87a). One program reported frequent referrals of teens by a local suicide prevention counseling service. Potteiger ¶ 9 (Dec. 15, 1987). Most of those teens, after counseling about available options, chose to terminate their pregnancies. *Id.*

14 For example, the mortality risk for abortion rises 50% each week after the eighth week of pregnancy while the risk of major complications increases by approximately 30% each week. Morley ¶ 12 (79a).

On November 1, 1989, a divided court of appeals affirmed the district court decision. The opinion of the court construed the statutory prohibition on the use of Title X funds for the performance of abortion to "specifically exclude[ ]" informational speech about abortion as well. (49a). The court disregarded contemporaneous and subsequent legislative history indicating a contrary interpretation of the Act, (48-50a), as well as the contemporaneous and longstanding HHS view that Title X permitted and even required such counseling and referral, (50-51a). The court did not address the claim that the regulations are arbitrary and capricious. (53a). Finally, the court concluded that the regulations do not impermissibly infringe on speech, (56-59a), or privacy, (53-56a), because they are only a condition on the receipt of government funds, (53-59a). It found "constitutionally irrelevant" the fact that the regulations "impair and impede" women's exercise of their rights. (55a). The court failed to address arguments that the regulations impermissibly burden nonfederally funded speech and that they are void for vagueness.

The concurring and dissenting judges were, however, deeply troubled by the impact of the regulations on the Title X doctor-patient relationship. Both judges found the regulations to interfere with the patient's informed choice about pregnancy and to create a risk of serious health consequences for those relying on Title X physicians. (Cardamone, J., con-

curring) (61-62a);[15] (Kearse, J., dissenting) (65-66a). Judge Cardamone concurred in the judgment although he found that the regulations "fall woefully short of the tolerant spirit that gave birth to and should continue to animate our constitutional system." (62a). Judge Kearse, in dissent, concluded that the regulations discriminate on the basis of viewpoint, (63-64a), interfere with a woman's right to choose whether to have an abortion, (65a), and are "arbitrary and capricious" because the Secretary's "about-face" was neither required by the statute nor justifiable, (66-67a).

On November 21, 1989, the Second Circuit unanimously enjoined enforcement of the regulations and stayed its mandate pending disposition of the case by this Court. (68-69a). Thus petitioners continue to receive grant funds under the terms of the preexisting regulations.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS A SIGNIFICANT CONSTITUTIONAL QUESTION ABOUT THE EXTENT TO WHICH THE FEDERAL GOVERNMENT MAY CURTAIL SPEECH AND INFORMATION ABOUT ABORTION IN A FEDERALLY FUNDED PUBLIC HEALTH PROGRAM.

This case presents a significant question whether the Constitution permits the federal government to both censor and compel speech within a federally subsidized doctor-patient dialogue in order to steer women, indiscriminately, toward childbirth over abortion. This question was neither addressed nor resolved in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), in which the only speech issue presented to this Court was dismissed as moot. *Id.* at 3053-54; *id.* at 3060 (O'Connor, J., concurring). Similarly, the issue was not

15 Judge Cardamone noted that the regulations were "crafted" to "constitute a trap for the mostly unsophisticated and unwary patients, and [to] jeopardize[ ] the ability of Title X physicians to safeguard the health of those seeking their expert advice." (footnote omitted) (61a).

resolved by this Court's summary affirmance in *Babbitt v. Planned Parenthood*, 479 U.S. 925 (1986).[16] Finally, neither *Harris v. McRae*, 448 U.S. 297 (1980), nor *Maher v. Roe*, 432 U.S. 464 (1977), involved First Amendment challenges to restrictions on speech.[17]

The issue posed by this case not only "has not been, but should be, settled by this Court." Sup. Ct. R. 10.1(c). As this Court has recently recognized, important and "complicated" issues arise when government both subsidizes and regulates the speech of professionals. *See University of Pa. v. EEOC*, 110 S. Ct. 577, 587 n.6 (1990) (citing *Meese v. Keene*, 481 U.S. 465, 484 (1987)). Yet, with increasing frequency, government has sought to adopt this dual role, particularly with regard to matters of sexuality, reproduction, and abortion.[18] Indeed, in its brief urging that probable jurisdiction be

16 In *Babbitt*, the Ninth Circuit had held that Arizona's ban on abortion counseling and referral in state-funded programs was constitutional as applied to the use of state funds, *Planned Parenthood v. Arizona*, 718 F.2d 938, 944 (9th Cir. 1983) (*Planned Parenthood I*), but unconstitutional as applied to the use of non-state funds. *Planned Parenthood v. Arizona*, 789 F.2d 1348, 1351 (9th Cir.) (appeal after remand) (*Planned Parenthood II*), *aff'd sub nom. Babbitt v. Planned Parenthood*, 479 U.S. 925 (1986); *see generally Planned Parenthood I*, 718 F.2d at 944-46. Because this Court summarily affirmed the Ninth Circuit in an appeal from *Planned Parenthood II*, the conditional cross-appeal challenging the holding in *Planned Parenthood I* was dismissed. *See* 479 U.S. 925 (1986).

17 The questions presented were limited to religious freedom and equal protection in *Harris*, 48 U.S.L.W. 3546 (U.S. Feb. 19, 1980) (No. 79-1268), and to equal protection in *Maher*, 45 U.S.L.W. 3062 (U.S. July 27, 1976) (No. 75-1440).

18 *See* Adolescent Family Life Act of 1981, 42 U.S.C. § 300z-10(a) (1988) (forbidding award of funds to programs that counsel or refer for abortion); Standard Provisions for U.S. Nongovernmental Grantees, *reprinted in* U.S. Agency for Int'l Dev., 13 AID Handbook, June 19, 1987 (implementing Policy Statement of the United States of America at the United Nations International Conference on Population (2d Sess.), Mexico, Aug. 6-13, 1984 (governing grants made pursuant to the Foreign Assistance Act of 1961, 22 U.S.C. § 2151 (1988)) (prohibiting domestic nongovernmental organizations receiving AID funds from assisting foreign nongovernmental organizations that provide information about the availability and bene-

noted in *Webster*, the United States argued that the speech issues in that case were "substantial" and should be resolved through "plenary consideration" because summary affirmance would leave uncertain the legality of the Title X regulations at issue herein. Brief for the United States as *Amicus Curiae* Supporting Appellants at 6, 10-11, *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989) (No. 88-605).

Finally, resolution of this case will have important practical as well as constitutional ramifications. At issue are regulations governing a program with an annual budget approaching $200 million that funds nearly 4000 clinics affecting upwards of five million women nationwide. The legality of the regulations remains hotly disputed and their enforcement against the vast majority of grant recipients has thus far been enjoined.[19] Absent a decision by this Court, the validity of the Title X program will remain uncertain and uneven enforcement could result.[20]

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fits of abortion)). Such restrictions on funded health consultations and information are not unique to the abortion context. Centers For Disease Control funds for AIDS education may not be used for counseling or education "designed to promote or encourage, directly, homosexual or heterosexual sexual activity or intravenous drug use." Health Omnibus Programs Extension Act of 1988, Pub. L. No. 100-607, § 221, 1988 U.S. Code Cong. & Admin. News (102 Stat.) 3093.

19 *See Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465 (D. Colo. 1988) (preliminary injunction), 687 F. Supp. 540 (D. Colo. 1988) (permanent injunction), *appeal pending*, No. 88-2251 (10th Cir.) (oral argument held May 11, 1989); *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988) (permanent injunction), *aff'd*, No. 88-1279 (1st Cir. May 8, 1989), *vacated and withdrawn, reh'g en banc granted*, 873 F.2d 1528, No. 88-1279 (1st Cir. Aug. 9, 1989) (*en banc* oral argument held Dec. 5, 1989).

20 Should certiorari be denied in the instant case, petitioners will lose the protection of their injunction. (68-69a). Irreparable harm will result because the Secretary has made plain his intention to enforce the regulations, even if he may do so only temporarily and only in New York. *See generally* Defendant-Appellee's Declaration in Opposition to Plaintiff-Appellants' Motion for an Injunction Pending Review on Writ of Certiorari, *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989) (Nos. 88-6204, 6206).

II. THE SECOND CIRCUIT'S HOLDING THAT THE CHALLENGED REGULATIONS ARE CONSTITUTIONAL IS INCONSISTENT WITH THE DECISIONS OF THIS COURT.

A. The Second Circuit Erred in Holding that Regulations 59.8, 59.9, and 59.10 Do Not Violate the First Amendment.

1. Sections 59.8 and 59.10 impermissibly discriminate on the basis of viewpoint so as to suppress information about abortion.

In finding that the regulations constitute a permissible decision by the government not to "subsidize the exercise of fundamental . . . speech rights," (56a), the Second Circuit ignored this Court's repeated admonition that government may not "discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.' " *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 548 (1983) (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)); *see also Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 811-13 (1985). These regulations do exactly that.

First, contrary to the holding of the Second Circuit, (59a), §§ 59.8 and 59.10 are facially viewpoint discriminatory. Section 59.8 prohibits speech about abortion while requiring speech about the "opposite" treatment choice for pregnancy. Thus, Title X providers "may not" counsel about or refer for abortion, § 59.8(a)(1), (3a), even upon request, and if asked about abortion are obliged to tell patients that "the project does not consider abortion an appropriate method of family planning," § 59.8(b)(5), (5a). At the same time, Title X providers are compelled to refer pregnant women to prenatal care providers that "promote the welfare of . . . [the] unborn child," § 59.8(a)(2), (3a), and to provide "information necessary to protect the health of . . . [the] unborn child," *id.* Section 59.10 reflects a similar bias. That section requires Title X providers to refrain from speech that advocates, encourages, or promotes legal abortion; however,

speech discouraging or opposing abortion is not similarly prohibited. (6-7a).

Because these regulations do not treat speech about competing pregnancy options in an evenhanded fashion, they invidiously discriminate on the basis of viewpoint. *See Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 230 (1987) (" 'The First Amendment's hostility . . . extends . . . to restrictions on particular viewpoints . . . .' ") (citation omitted); *id.* at 237 (Scalia, J., dissenting) (noting the necessity of "a . . . stringent prophylactic rule . . . when the subsidy pertains to the expression of a particular viewpoint").[21] *See also Pacific Gas & Elec. v. California Pub. Util. Comm'n*, 475 U.S. 1, 15 (1986).

Second, because the Secretary apparently regards abortion as a "dangerous idea[ ]," *Cammarano*, 358 U.S. at 513, the regulations have both the purpose and the effect of suppressing speech about this disapproved subject. Within the Title X program, this suppression is achieved by employing the Title X funded physician as a spokesperson for government views and by censoring information regarding the disfavored medical choice of abortion that is conveyed to reliant, if not captive, listeners.[22] Katz ¶ 7 (84a); Morgan ¶ 6 (86a); Felton

21 Moreover, the Title X program differs from the tax exemptions analyzed in *Ragland* and *Regan* in an important respect: Title X was enacted with the express purpose of "designat[ing] . . . a place [for] or channel of communication," *Cornelius*, 473 U.S. at 802, between health care personnel and the public on subjects of family planning and reproductive health. *See* 42 U.S.C.A. § 300 historical note (West 1982) (one purpose of Title X was to make "readily available information . . . on family planning and population growth to all persons") (71a). The question whether a subsidy program such as Title X should be analyzed as a "limited" or "designated" public forum, *see Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 & n.7 (1983); *Cornelius*, 473 U.S. at 802, rather than as a subsidy scheme of the sort analyzed in *Regan*, has not previously been considered by this Court.

22 If government may limit protected speech to shield a "captive" audience, *see, e.g., Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), surely it cannot amplify its own voice to the exclusion of others by exploiting the "captivity" of intended listeners. *See, e.g., New York City Unemployed*

¶ 13b (88a). The inequality of knowledge between doctor and patient, together with the dependence of patients on their Title X health professionals, *see supra* Statement of the Case (A), renders these regulations a devastatingly effective means of suppressing the "idea" of abortion in the minds of the low-income women served by the program.[23]

Moreover, §§ 59.9 and 59.10 will have the further effect of suppressing information about abortion in the communities served by Title X. Section 59.9 will prevent many clinics receiving Title X funds from being able to provide informa-

& Welfare Council v. Brezenoff, 742 F.2d 718, 722 (2d Cir. 1984) (finding welfare recipients to be "captive" at office in which checks are received). This is particularly true in the context of a medical consultation. An indigent woman seeking medical information from her Title X physician is in effect "captive" because she desperately needs the information and often has nowhere else to go. *See, e.g.*, Coombs ¶ 11 (86a). The "captivity" and dependency that characterize this doctor-patient relationship change the action challenged herein from a permissible introduction of government's voice in the "marketplace of ideas" to an impermissible means of skewing the medical information available in the only "marketplace" in which low-income women can obtain advice and counsel regarding a pregnancy choice. The latter approaches indoctrination. *See Texas v. Johnson*, 109 S. Ct. 2533, 2546 (1989) (state may not "prescribe what shall be orthodox" and impose its "political preferences" on "the citizenry"); *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503, 511 (1969) ("[S]tudents may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.").

23 Such suppression is contrary not only to the principles of *Regan* and *Cammarano*, but also to the legal and ethical imperatives that govern the doctor-patient dialogue. *See generally University of Pa. v. EEOC*, 110 S. Ct. 577, 587 (1990) (discussing First Amendment protection against content-based infringement of "faculty's professional judgment" in a university context). Doctors in New York, as in a majority of states, risk liability for failure to provide patients with complete information as to their medical options. Randolph ¶ 3 (77a); Gesche ¶ 15 (75-76a); Rosenfield ¶ 9 (680-81A); Morley ¶ 21 (80a). Moreover, the professional standards of the American Medical Association ("AMA") and the American College of Obstetricians & Gynecologists ("ACOG") require doctors to provide full, unbiased information about and referral for all medical alternatives, *see generally* Sammons (80-82a); Morley (78-80a), even those they are unwilling or unable to provide. Katz ¶ 10 (84a); Cohen ¶ 5 (509A). Compliance with the Title X regulations will thus place doctors at risk of legal liability and professional censure.

tion about abortion even with non-Title X funds. *See infra* Point II(A)(2). Because many communities currently served by Title X have no other comparable provider of reproductive health care and information, *see, e.g.*, Randolph ¶¶ 10, 12, 14, 18 (Nov. 13, 1989); Coombs ¶ 11 (86a), the inability of programs that receive Title X funds to offer abortion information even with other monies will leave these communities without such information. Finally, because the provision of information about abortion will in some cases "promote" or "encourage" that choice, § 59.10 will prohibit Title X projects from disseminating literature and offering community education programs that include neutral information about abortion. *See supra* Statement of the Case (A).[24]

In these ways, the regulations "rais[e] a reasonable danger that the idea [of abortion as an available option] will be 'drowned out.' " *Student Gov't Ass'n v. Board of Trustees*, 868 F.2d 473, 479 n.4 (1st Cir. 1989); *see also Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3052 n.8 (1989). Where, as here, the government effectively monopolizes the sources of medical information upon which entire communities rely, a viewpoint discriminatory subsidy scheme impermissibly suppresses speech.

2. The requirement of § 59.9 that Title X programs be physically separate from programs providing abortion information impermissibly burdens speech funded by sources other than Title X.

The requirement that the Title X program be *physically* as well as financially separate from counseling and education about, referral for, and performance of abortion impermissibly burdens expression *not* funded by Title X. Clinics lack

24 The vagueness of the prohibitions against "encouraging," "counseling," or "advocating" abortion, as well as of the requirement of "physical separat[ion]," will further chill speech about abortion. *See City of Lake Wood v. Plain Dealer Publishing Co.*, 108 S. Ct. 2138, 2144 (1988) (unfettered discretion "intimidates parties into censoring their own speech"). Although the Second Circuit did not address the question of vagueness, the issue was fully briefed and thus preserved for review.

the resources to locate, furnish, and establish a separate facility, or to sustain such a facility with the ongoing costs of duplicative staff, administration, and maintenance that would entail. *See, e.g.*, Fink ¶ 13 (85a); Tiezzi ¶ 8e (94-95a); Drisgula ¶ 27 (90a). Thus, the vast majority of Title X clinics will have to cease *all* speech about abortion, even that funded by other sources, in order to remain recipients of Title X monies.

Moreover, for those clinics that can afford to comply, the separation requirement will constrain their ability to freely allocate scarce resources, *see, e.g.*, Felton ¶ 14 (530A); Pasternack ¶ 15 (675A), and to implement an innovative and respected health care philosophy favoring the integration of family planning, prenatal, and adoption services into a single coordinated program.[25] Because § 59.9 constrains critically expressive choices, it impermissibly impinges upon protected speech. *Cf. Buckley v. Valeo*, 424 U.S. 1, 19-20 (1976) (finding that limitations on expenditures burden expression).[26]

This Court has repeatedly held that government may not condition benefits or subsidies on the relinquishment of a constitutional right. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *see also Speiser v. Randall*, 357 U.S. 513, 518-19 (1958).[27] Because § 59.9 operates to severely burden the Title

25 This philosophy, for which several Title X recipients are well-known, *see, e.g.*, M. White ¶¶ 2-3 (Dec. 15, 1987); Bennett ¶ 24 (502A), has proven to be especially effective for teenagers, who frequently do not pursue referrals. Morgan ¶ 8 (86-87a); M. White ¶ 6 (93-94a); Klepper ¶ 20 (Feb. 5, 1988).

26 By defining "Title X project funds [to] include all funds allocated to the Title X program, including but not limited to grant funds, grant-related income or matching funds," (2a), § 59.2 also impermissibly burdens Title X recipients' constitutionally protected activities. Because the prohibitions of §§ 59.8 and 59.10 against counseling about, referral for, and advocacy of abortion apply to all "Title X project funds" as defined in § 59.2, the regulations explicitly condition funding on the cessation of protected speech about abortion that is *not* funded by Title X.

27 Statutes prohibiting the distribution of state funds to programs that provide abortion counseling, even with private funds, consistently have been held to impermissibly condition benefits on the relinquishment of constitutional rights. *See Planned Parenthood v. Arizona*, 718 F.2d 938 (9th Cir. 1983), *appeal after remand*, 789 F.2d 1348 (9th Cir.), *aff'd sub nom. Babbitt*

X recipient's "us[e of] even wholly private funds to finance its [speech] activity," it violates the First Amendment. *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984). *See also FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 255 (1986) (plurality) (finding unconstitutional separation requirements so onerous that they were likely to "discourage protected speech").[28] *Cf. First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978) (government may not advance some viewpoints by burdening the expression of others); *Buckley*, 424 U.S. at 48-49 (same).

Finally, there is no showing that *physical* separation is necessary to prevent government funding of speech about abortion. *See generally Massachusetts v. Bowen*, 679 F. Supp. 137, 142 (D. Mass. 1988) (summarizing evidence showing no need for physical separation); *see also New York v. Sullivan*

v. Planned Parenthood, 479 U.S. 925 (1986); *Planned Parenthood Ass'n v. Kempiners*, 531 F. Supp. 320 (N.D. Ill. 1981), *vacated and remanded on other grounds*, 700 F.2d 1115 (7th Cir. 1983), *on remand*, 568 F. Supp. 1490 (N.D. Ill. 1983); *Valley Family Planning v. North Dakota*, 489 F. Supp. 238 (D.N.D. 1980), *aff'd on other grounds*, 661 F.2d 99 (8th Cir. 1981).

28 Unlike the restriction on lobbying found constitutional in *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 544 n.6 (1983) (requiring "only" separate incorporation and record-keeping for organization to continue its otherwise prohibited activities), the requirement of physical separation as a condition of continued speech about abortion is so burdensome as to make Title X grant recipients "unable to operate with the dual structure." *Id. Cf. FCC v. League of Women Voters*, 468 U.S. at 400 (suggesting that FCC's ban on editorializing might have withstood scrutiny if physical separation were not required because an affiliate organization could then "use the station's facilities to editorialize"). The separation requirement at issue here is further distinguished from that in *Regan* because § 59.8's prohibition of referrals for abortion, in many instances, will operate to bar Title X programs from referring pregnant patients to their physically separate "affiliates" for either abortions or abortion information. § 59.8(a)(3), (3a). Because the two entities will not be able to work in tandem, the First Amendment problems are "insurmountable." *See Regan*, 461 U.S. at 553 (Blackmun, J., concurring) (emphasizing First Amendment problem "[s]hould the IRS attempt to limit the control these organizations exercise over the lobbying of their § 501(c)(4) affiliates"). Because § 59.9 does not provide a viable separation option of the sort found in *Regan* and suggested in *FCC*, it impermissibly burdens the speech of Title X recipients.

(Kearse, J., dissenting) (66a). Accordingly, the Second Circuit's failure to find § 59.9 unconstitutional is inconsistent with the precedent of this Court.

B. The Second Circuit Erred in Holding that These Regulations Do Not Violate the Right of Privacy.

Looking to *Maher v. Roe*, 432 U.S. 464 (1977), *Harris v. McRae*, 448 U.S. 297 (1980), and *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), the Second Circuit dismissed plaintiffs' privacy claims. (53-56a). The court reasoned that restrictions on the availability of public resources for the *performance* of abortions present a greater impediment to women's exercise of their privacy rights than do restrictions on *speech* about abortion in a doctor-patient consultation. (55a). This conclusion ignores the factual record. Because these regulations require the provision of misinformation, they do more than encourage childbirth. Rather, they constitute a "direct state interference with a protected activity," *Maher*, 432 U.S. at 475, and do not, as in *Harris*, leave an indigent woman no worse off with regard to her "range of choice . . . [than] if Congress had chosen to subsidize no health care costs at all." *Harris*, 448 U.S. at 317.

Although government need not subsidize or facilitate the exercise of a right, it nonetheless may not interfere with that right. The record in this case establishes that these regulations affirmatively interfere with choice. Women who have come to rely on Title X for medically sound advice will be misled by the incomplete information and biased referral lists that must be provided under the new regulations.[29] The silence of a trusted doctor on the subject of abortion will lead many women to believe that abortion is not an appropriate or medically indicated option for them. Merrens ¶ 17 (641A); *see also* Morley ¶ 17 (664A); Sammons ¶ 8 (81a). Inappropriate referrals will result in delay for many women seeking an

29 The Second Circuit unanimously concluded that the regulations "may hamper or impede women in exercising their right of privacy in seeking abortions." (Winter, J.) (55a); (Cardamone, J., concurring) (61-62a); (Kearse, J., dissenting) (64-66a).

abortion, a result with serious health consequences.[30] *See, e.g.*, Morley ¶¶ 12-13 (79a); Cohen ¶ 3 (89a). Moreover, the inability of providers to counsel women for whom abortion may be medically indicated, such as those with AIDS, will have particularly serious consequences. *See, e.g.*, Sammons ¶ 8 (81a); Morley ¶ 17 (664A); Joseph ¶¶ 6-7 (Nov. 9, 1989).

This Court has considered the constitutionality of intrusions into the doctor-patient dialogue with special care. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 759, 762 (1986); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 429-30, 443-45 (1983). The funded nature of the dialogue at issue here cannot justify the wholesale suspension of these basic principles. *See also supra* Point II(A)(1).

III. THE SECOND CIRCUIT'S CONCLUSION THAT THE CHALLENGED REGULATIONS ARE A PERMISSIBLE EXERCISE OF THE SECRETARY'S AUTHORITY PRESENTS IMPORTANT, UNSETTLED QUESTIONS OF LAW AND IS INCONSISTENT WITH THE DECISIONS OF THIS COURT.

A. The Second Circuit's Interpretation of Title X in a Manner at Odds with Its Overall Language and Purpose Presents a Significant Issue Necessitating Resolution by this Court.

The Second Circuit concluded that § 1008 "specifically excludes" counseling and referral for abortion from the scope of Title X services. (49a). In so concluding, the court failed to follow established dictates of statutory construction. Because the Second Circuit's misinterpretation of the Act will affect the lives and health of the millions of women dependent on the program, this case presents an issue that should be resolved by this Court. *See* Sup. Ct. R. 10.1(c).

30 As this Court has previously held, government-imposed delay impermissibly burdens a woman's right to choose abortion. *See, e.g., City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 450-51 (1983).

While the Second Circuit correctly made the plain language of the statute its "starting point," *Hallstrom v. Tillamook County*, 110 S. Ct. 304, 308 (1989) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)), it failed to read the statutory provision in a manner consistent with "ordinary usage." *See Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981, 1994 (1989) (Scalia, J., concurring); *see also Mississippi Band of Choctaw Indians v. Holyfield*, 109 S. Ct. 1597, 1608 (1989). The plain language of § 1008 refers only to "abortion" and does not exclude abortion counseling and referral from the broad scope of Title X funded services.[31] Contrary to the reasoning of the Second Circuit, (47a), programs providing abortion counseling and referral are not by definition "programs where abortion is a method of family planning" within the meaning of § 1008 of the Act. There is no evidence that Title X providers have ever counseled pregnancy termination as a "family planning" option equivalent to diaphragms, intrauterine devices (IUDs), oral contraceptives, and other pregnancy prevention options.[32] Instead, Title X programs, like all high quality providers of reproductive health services, treat abortion as a backup to contraceptive or human failure and as an option when pregnancy termination is medically indicated. *E.g.*, Felton ¶ 13a (528A); *see also* Rust ¶ 17a (92-93a); Tiezzi ¶ 8a (94a). The Second Circuit's construction of § 1008 thus departs from the "ordinary usage" of the term "method of

31 "[T]he enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded." *In re Cash Currency Exch., Inc.*, 762 F.2d 542, 552 (7th Cir. 1985); *see Andrus v. Glover Constr. Co.*, 446 U.S. 608, 617 (1980) ("additional exceptions not to be implied"); *see also American Bank & Trust Co. v. Dallas County*, 463 U.S. 855, 864 (1983).

32 The ordinary meaning of the term "family planning" does not extend to abortion. *See Webster's Ninth New Collegiate Dictionary* 448, 154 (1986) (defining "family planning" as a means of spacing children through a "method[ ] of birth control," a term defined as a means of "preventing or lessening the frequency of conception"); *see also* J. Pritchard, P. MacDonald & N. Gant, *Williams Obstetrics* 467-90, 811-36 (17th ed. 1985) (Chapter 24 is entitled "Abortion" while Chapter 40, entitled "Family Planning," addresses methods of contraception).

family planning" in the reproductive health field, as well as from the Secretary's longstanding view. *See infra* Point III(B).[33]

Moreover, the Second Circuit's reading of § 1008 fails to comport with the "object and policy" of the Title X statute,[34] *see Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (quotations and citations omitted), as evidenced in its legislative history. *See also Hallstrom*, 110 S. Ct. at 310; *Public Citizen v. United States Dep't of Justice*, 109 S. Ct. 2558, 2566 (1989); *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123-25 (1987). The purpose of Title X was to establish a high quality public health program, specializing in family planning, and thereby to equalize the opportunity of poor women to make reproductive choices. *See, e.g.*, H.R. Rep. No. 1472, 91st Cong., 2d Sess. 7, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5074 (252A). Because Congress was aware that Title X would be

33 Indeed, the Second Circuit's reading of the statute amounts to a somewhat belated proclamation that for 17 years HHS operated the much lauded Title X program in patent violation of its authorizing statute, a result that is difficult to fathom. This Court has not hesitated to set aside such a reading of a statute in favor of one that comports with common sense and congressional intent. *E.g.*, *Public Citizen v. United States Dep't of Justice*, 109 S. Ct. 2558, 2566 (1989); *Bock Laundry*, 109 S. Ct. at 1984-85; *id.* at 1994 (Scalia, J., concurring); *id.* at 1995 (Blackmun, J., dissenting). *See Missouri v. Jenkins*, 109 S. Ct. 2463, 2470 (1989).

34 The Second Circuit's construction of § 1008 is also incompatible with "the surrounding body of law into which the provision must be integrated." *Bock Laundry*, 109 S. Ct. at 1994 (Scalia, J., concurring); *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988); *Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399, 405 (1988). Title X authorizes the Secretary "to make grants . . . and enter into contracts . . . to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of *acceptable* and effective family planning methods *and services* . . . ." 42 U.S.C. § 300(a) (1982) (emphasis added) (1A). It is difficult to reconcile this language with an administrative requirement that grantees provide care in a manner that is *unacceptable* in the view of the AMA, ACOG, and others. *See, e.g.*, Sammons ¶¶ 4, 8 (81a); Morley ¶¶ 18, 19, 21 (79-80a). *See also* Gesche ¶ 15 (76a); Randolph ¶ 3 (discussing New York laws requiring informed consent) (77a); Katz ¶¶ 6-8 (discussing common law obligation of information disclosure) (83-84a).

the only source of medical care for some women, the services it provided, whether directly or by referral, were to be "broad." *See* 42 U.S.C. § 300(a) (1A).[35] "[R]eferral to other [non-funded] medical services as needed" was considered an essential component of the Title X program and not excluded by § 1008. S. Rep. No. 1004, 91st Cong., 2d Sess., *reprinted in* 116 Cong. Rec. 24,096 (1970) (70a).[36]

Finally, the Second Circuit's interpretation of § 1008 must be rejected because it violates the principle that "every reasonable construction must be resorted to, in order to save [the] statute from unconstitutionality," *Hooper v. California*, 155 U.S. 648, 657 (1895), *quoted in Debartolo v. Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988); *see, e.g., Frisby v. Schultz*, 108 S. Ct. 2495, 2501 (1988), and because the court's holding "engenders constitutional issues" that should be avoided if possible. *Gomez v. United States*, 109 S. Ct. 2237, 2241 (1989); *see Public Citizen*, 109 S. Ct. at 2572.

35 The Conference Report specifically stated that, in addition to "preventive family planning services," Title X was to fund "other related medical, informational, and educational activities." H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 5080, 5081-82 (70a); *see also* 42 U.S.C.A. § 300 historical note (West 1982) (70-71a) (declared purpose of Act includes making available "comprehensive" services as well as "educational materials . . . on family planning and population growth . . . ."); S. Rep. No. 1004, 91st Cong., 2d Sess., *reprinted in* 116 Cong. Rec. 24,095-96 (1970) (70a) ("family planning [is not] merely a euphemism for birth control" and "should consist of much more than the dispensation of contraceptive devices"). *See generally supra* Statement of the Case (A).

36 The Second Circuit's conclusion as to § 59.9 is also at odds with congressional intent. The separation requirement undermines Congress' intent that Title X be an integral part of a broader health care system and not "interfere with or limit programs conducted in accordance with State or local laws and regulations which are supported" with non-Title X funds. H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 5080, 5082. (70a). Consistent with this intent, HHS had previously interpreted § 1008 not to require physical separation between activities prohibited and permitted under Title X as construed by the agency. *See* Memorandum from Joel M. Mangel, Deputy Assistant General Counsel, to Louis M. Hellman, M.D., Deputy Assistant Secretary for Population Affairs (Apr. 20, 1971) (concluding that hospital receiving Title X funds may provide abortions on same premises) (74a).

B. The Second Circuit's Decision Presents a Serious Question as to the Proper Degree of Deference To Be Accorded an Agency Reinterpretation of Its Authorizing Statute.

This Court has emphasized the deference due to an agency's construction of its authorizing statute, *see Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), so long as that construction is not at odds with the language or structure of the statute. *See Public Employees Retirement Sys. v. Betts*, 109 S. Ct. 2854, 2863 (1989); *Etsi Pipeline Project v. Missouri*, 484 U.S. 495, 516-17 (1988).[37] Such deference is due particularly when the agency interpretation is contemporaneous with the statute's enactment, *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 124 n.20 (1987); *BankAmerica Corp. v. United States*, 462 U.S. 122, 130 (1983), and remains consistent over a long period of time, *see NLRB*, 484 U.S. at 124 n.20; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987).

In this case, HHS first construed Title X when it promulgated the original regulations governing applications, grants, and programs administered pursuant to the Act. These regulations required Title X funded programs to make "necessary referral[s] to other medical facilities," 36 Fed. Reg. 18,465, 18,466 (1971) (§ 59.5(d)) (789A); *id.* at 18,466 (§ 59.5(e)) (789A), and reiterated that the only services *not* to be provided were "*abortions* as a method of family planning." *Id.* at 18,466 (§ 59.5(a)(9)) (emphasis added) (789A). Moreover, consistent with the arguments set forth above, *see supra* Point III(A), the agency originally understood § 1008 to be addressed to the practice of treating abortion as an alterna-

37 Recently, this Court again made clear that, even where Congress has delegated authority to the Secretary, regulations that are more restrictive than statutory standards are invalid. *See Sullivan v. Zebley*, 58 U.S.L.W. 4177 (U.S. Feb. 20, 1990).

tive to contraception.[38] Such contemporaneous construction by an agency of its authorizing statute is given "great weight," *BankAmerica*, 462 U.S. at 130, because the agency is "presumed to have been aware of congressional intent" in enacting the law, *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979), may have been involved in drafting the legislation, *e.g.*, *Rice v. Rehner*, 463 U.S. 713, 730 n.13 (1983), or may have had congressional "oversight and approval" when formulating the initial regulations. *See, e.g.*, *School Bd. v. Arline*, 480 U.S. 273, 279 (1987).

In contrast to the Secretary's contemporaneous interpretation of § 1008, the regulations challenged herein are not due the deference they received from the Second Circuit. First, HHS's recent interpretation of § 1008 abruptly departs from seventeen years of adherence to its contemporaneously developed view.[39] It is therefore " 'entitled to considerably less deference' than a consistently held agency view," *INS*, 480 U.S. at 446 n.30 (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)); *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 646 n.34 (1986). Second, the agency provided no "good reason

38 In its first report to Congress pursuant to 42 U.S.C. § 300a-6a, the agency stated:

> Within the context of family planning services programs, abortions are not viewed as a method of fertility control but as a service that should be available in accordance with local laws only in the event of a human or contraceptive method failure.

National Center for Family Planning Services, Health Services and Mental Health Administration, Department of Health, Education, and Welfare, *A Five-Year Plan for the Delivery of Family Planning Services* 319 (Oct. 1971) (73a).

39 According to longstanding agency interpretation, § 1008 permitted neutral abortion counseling and referral and barred Title X programs only from affirmatively "promoting," "encouraging," or "advising" patients to have abortions. *See, e.g.*, Letter from Louis M. Hellman, M.D., Deputy Assistant Secretary for Population Affairs, to Hilary H. Conner, M.D., Regional Health Administrator (Nov. 19, 1976) (74a); Memorandum from Carol Conrad, Senior Attorney, Public Health Division, to Elsie Sullivan, Office for Family Planning (July 25, 1979) (105A). Indeed, 1981 HHS Guidelines confirmed that Title X grantees were required to inform pregnant women of all their options—parenting, adoption, and abortion. 1981 Guidelines at § 8.6 (71a).

for the change," *see Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835, 1848 (1989); *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983),[40] and did not, as in cases cited by the Second Circuit, *see* 50-51a, rely upon a change in factual circumstances to justify the reversal.[41] Finally, the new regulations do not stem from agency expertise regulating a complex industry according to technical and evolving standards,[42] but are instead a

40 Indeed, a 1982 report found "no evidence that title X funds had been used for abortions or to advise clients to have abortions" or "that any women were . . . encouraged to have abortions." General Accounting Office, *Restrictions On Abortion And Lobbying Activities In Family Planning Programs Need Clarification* (Sept. 24, 1982) (734A). In the absence of such evidence, the agency "about-face" is arbitrary and capricious and therefore not entitled to deference. *See American Hosp. Ass'n*, 476 U.S. at 643; *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 659 (1980); *New York v. Sullivan* (Kearse, J., dissenting) (66a).

41 The Second Circuit relied on two cases for the proposition that an agency rescission or modification may at times be accorded deference. (50-51a). Neither case supports an agency reversal *without* evidence of changed circumstances. *See Motor Vehicles*, 463 U.S. at 42 (agency may adapt rules to "changing circumstances") (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)); *American Trucking Ass'n, Inc. v. Atchinson, T.S.F. Ry. Co.*, 387 U.S. 397, 416 (1967).

42 Title X does not delegate rule-making authority as part of a "regulatory scheme [that] is technical and complex," *Chevron*, 467 U.S. at 865, and thus uniquely beyond the scope of judicial expertise. *Id. See generally* Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 469 (1987); Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 381-82 (1986). Nor does Title X, as do some authorizing statutes, delegate the authority to promulgate substantive regulations akin to "law." *E.g.*, *Batterton v. Francis*, 432 U.S. 416, 425 & n.9 (1977); *see Continental Air Lines v. Department of Transp.*, 843 F.2d 1444, 1449 (D.C. Cir. 1988) (describing *Batterton* as the "paradigm . . . of an express delegation of legislative power"). *Cf. Zebley*, 58 U.S.L.W. at 4178 n.2 (invalidating regulations promulgated under even such broad rule-making authority); *id.* at 4183 (White, J., dissenting). Instead, Title X delegates to the Secretary only the authority to administer a federal grant program, not the authority to regulate the family planning "industry."

bald new reading of § 1008[43] resulting from a "shift in the political climate." *New York v. Sullivan* (Kearse, J., dissenting) (quoting Transcript of Oral Argument at 52 (Feb. 19, 1988), *New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988) (Nos. 88-0701, 0702) (98a)) (67a); *see also* Letter from Rep. Christopher H. Smith, *et al.*, to Donald T. Regan (Aug. 1, 1986) (98a); Letter from Otis R. Bowen, M.D., to Rep. Vin Weber (Aug. 19, 1986) (99a).

IV. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

The holding of the Second Circuit conflicts with the Eighth Circuit's undisturbed conclusion that a ban on counseling about abortion by public employees and in public facilities impermissibly infringes a woman's right to privacy. *See Webster v. Reproductive Health Servs.*, 851 F.2d 1071, 1079-80 (8th Cir. 1988), *rev'd on other grounds*, 109 S. Ct. 3040 (1989).[44] This Court's decision in *Webster* does not invalidate this Eighth Circuit holding, as this Court did not address the circuit's explicit conclusion that, where speech restrictions are at issue, the analyses of *Maher v. Roe*, 432 U.S. 464 (1977), *Poelker v. Doe*, 432 U.S. 519 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), do not control. *Webster*, 851 F.2d at 1080. *See also Massachusetts v. Bowen*, 679 F. Supp. 137, 146, 147 (D. Mass. 1988) (finding regulations impermissibly "directed at the suppression of one viewpoint" and bur-

43 On "pure" questions of statutory construction, the agency view generally is entitled to little or no deference. *INS*, 480 U.S. at 446; *id.* at 448 (noting that "narrow legal question[s]" of statutory construction are "quite different from the question of interpretation that arises in . . . case[s] in which the agency is required to apply . . . standards to a particular set of facts"). This distinction has been followed by lower courts and endorsed by commentators. *E.g.*, *NLRB Union v. FLRA*, 834 F.2d 191, 198 (D.C. Cir. 1987); *Union of Concerned Scientists v. United States Nuclear Regulatory Comm'n*, 824 F.2d 108, 113 (D.C. Cir. 1987). *See generally* Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 476 (1989); Sunstein, *supra* note 42, at 466, 469; Breyer, *supra* note 42, at 372-82.

44 The State of Missouri did not appeal this holding. *See Webster*, 109 S. Ct. at 3053.

den women's privacy interests), *aff'd*, No. 88-1279, slip op. at 26-43 (1st Cir. May 8, 1989) (finding regulations unconstitutional on speech and privacy grounds), *vacated and withdrawn, reh'g en banc granted*, 873 F.2d 1528, No. 88-1279 (1st Cir. Aug. 9, 1989); *Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465, 1473-78 (D. Colo. 1988) (holding regulations violate First and Fifth Amendments), *appeal pending*, No. 88-2251 (10th Cir.).

In addition, the Second Circuit's conclusion that § 59.8's prohibition on abortion counseling and referral comports with Title X conflicts with the decision of the Eighth Circuit in *Valley Family Planning v. North Dakota*, 661 F.2d 99, 102 (8th Cir. 1981). In that case, the Eighth Circuit concluded that Title X "mandate[s] that comprehensive health care be provided, including referrals to other services, [such as abortion,] when medically indicated."[45]

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45 *See also Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465, 1469-72 (D. Colo. 1988) (holding defendant lacked statutory authority to enact challenged regulations), *appeal pending*, No. 88-2251 (10th Cir.); *Massachusetts v. Bowen*, 679 F. Supp. 137, 144 (D. Mass. 1988) (enjoining requirement of physical separation as "counter to congressional policy favoring coordination and integration of health care programs"), *aff'd*, No. 88-1279, slip op. at 13-14 (majority); *id.* at 55-56 (Torruella, J., concurring in relevant part) (finding § 59.9 exceeded statutory authority), *vacated and withdrawn, reh'g en banc granted*, 873 F.2d 1528, No. 88-1279 (1st Cir. Aug. 9, 1989); *Doe v. Pickett*, 480 F. Supp. 1218, 1220 (S.D. W. Va. 1979); *see also Planned Parenthood v. Montana*, 648 F. Supp. 47, 50-51 (D. Mont. 1986) (holding unconstitutional state provision conditioning Title X funds on physical separation between the program and any facility performing abortions).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

RACHAEL N. PINE
(Counsel of Record)
JANET BENSHOOF
LYNN PALTROW
KATHRYN KOLBERT
LOUISE MELLING
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800 ext. 520

NORMAN SIEGEL
ARTHUR N. EISENBERG
New York Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 382-0557

Attorneys for Petitioners Rust et al.

Of Counsel:

LAURIE R. ROCKETT
Hollyer, Jones, Brady, Smith, Troxell, Barrett & Chira
342 Madison Avenue
New York, New York 10173
(212) 818-1110

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Supreme Court of the United States

OCTOBER TERM, 1989

DR. IRVING RUST, on behalf of himself, his patients, and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

THE STATE OF NEW YORK, THE CITY OF NEW YORK, THE NEW YORK CITY HEALTH & HOSPITALS CORP.,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

APPENDIX TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

(Counsel on Inside Front Cover)

106 pp

Attorneys for Petitioners
The State of New York et al.

ROBERT ABRAMS
Attorney General of the
State of New York
120 Broadway
New York, New York 10271
(212) 341-2240

O. PETER SHERWOOD
Solicitor General

SUZANNE LYNN
(*Counsel of Record*)
Assistant Attorney General
Chief, Civil Rights Bureau

VICTOR A. KOVNER
Corporation Counsel
for the City of New York
100 Church Street
New York, New York 10007
(212) 566-3800

LORNA BADE GOODMAN
Assistant Corporation Counsel
Chief, Affirmative Litigation
Division

GAIL RUBIN
Assistant Corporation Counsel

Attorneys for Petitioners
Rust et al.

RACHAEL PINE
(*Counsel of Record*)
JANET BENSHOOF
LYNN PALTROW
KATHRYN KOLBERT
LOUISE MELLING
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800 ext. 520

NORMAN SIEGEL
ARTHUR EISENBERG
New York Civil Liberties
Union
132 West 43rd Street
New York, New York 10036
(212) 382-0557

Of Counsel:

LAURIE ROCKETT
Hollyer, Jones, Brady,
Smith, Troxell, Barrett
& Chira
342 Madison Avenue
New York, New York 10173
(212) 818-1110

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Amendments of Regulations Governing Grants for Family Planning Services

53 Fed. Reg. 2944-46 (1988)

(codified at 42 C.F.R. §§ 59.2, 59.5, 59.7, 59.8, 59.9, 59.10)

For the reasons set out in the preamble, Subpart A of Part 59, 42 Code of Federal Regulations, is hereby amended as set forth below.

PART 59—[AMENDED]

1. The authority citation for Subpart A of 42 CFR Part 59 is revised to read as follows:

Authority: 42 U.S.C. 300a—4

2. In 42 CFR 59.2, the following definitions are added:

§ 59.2 [Amended]

* * * * *

"Family planning" means the process of establishing objectives for the number and spacing of one's children and selecting the means by which those objectives may be achieved. These means include a broad range of acceptable and effective methods and services to limit or enhance fertility, including contraceptive methods (including natural family planning and abstinence) and the management of infertility (including adoption). Family planning services includes preconceptional counseling, education, and general reproductive health care (including diagnosis and treatment of infections which threaten reproductive capability). Family planning does not include pregnancy care (including obstetric or prenatal care). As required by section 1008 of the Act, abortion may not be included as a method of family planning in the Title X project. Family planning, as supported under this subpart, should reduce the incidence of abortion.

"Grantee" means the organization to which a grant is awarded under section 1001 of the Act.

* * * * *

"Prenatal care" means medical services provided to a pregnant woman to promote maternal and fetal health.

"Program" and "project" are used interchangeably and mean a coherent assembly of plans, activities and supporting resources contained within an administrative framework.

* * * * *

"Title X" means Title X of the Act, 42 U.S.C. 300, *et seq.*

"Title X program" and "Title X project" are used interchangeably and mean the identified program which is approved by the Secretary for support under section 1001 of the Act, as the context may require. Title X project funds include all funds allocated to the Title X program, including but not limited to grant funds, grant-related income or matching funds.

§ 59.5 [Amended]

3. In 42 CFR 59.5(a), paragraph (a)(5) is removed and paragraphs (a)(6) through (a)(11) are redesignated as paragraphs (a)(5) through (a)(10) respectively.

4. 42 CFR 59.5(b)(3)(i) is revised to read as follows:

§ 59.5 [Amended]

* * * * *

(b) * * *

(3) * * *

(i) achieve community understanding of the objectives of the Title X program.

* * * * *

5. In 42 CFR Part 59, § 59.7 through § 59.13 are redesignated as § 59.11 through § 59.17 respectively, and new § 59.7 through § 59.10 are added to read as follows:

§ 59.7 Standards of compliance with prohibition on abortion.

A project may not receive funds under this subpart unless it provides assurance satisfactory to the Secretary that it does not include abortion as a method of family planning. Such assurance must include, as a minimum, representations (supported by such documentation as the Secretary may request) as to compliance with each of the requirements in § 59.8 through § 59.10. A project must comply with such requirements at all times during the period for which support under Title X is provided.

§ 59.8 Prohibition on counseling and referral for abortion services; limitation of program services to family planning.

(a)(1) A Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.

(2) Because Title X funds are intended only for family planning, once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child. She must also be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept. In cases in which emergency care is required, however, the Title X project shall be required only to refer the client immediately to an appropriate provider of emergency medical services.

(3) A Title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by "steering" clients to providers who offer abortion as a method of family planning.

(4) Nothing in this subpart shall be construed as prohibiting the provision of information to a project client which is medically necessary to assess the risks and benefits of different methods of contraception in the course of selecting a method: *provided*, that the provision of this information does not include counseling with respect to or otherwise promote abortion as a method of family planning.

(b) *Examples.* (1) A pregnant client of a Title X project requests prenatal care services, which project personnel are qualified to provide. Because the provision of such services is outside the scope of family planning supported by Title X, the client must be referred to appropriate providers of prenatal care.

(2) A Title X project discovers an ectopic pregnancy in the course of conducting a physical examination of a client. Referral arrangements for emergency medical care are immediately provided. Such action is in compliance with the requirements of paragraph (a)(2) of this section.

(3) A pregnant woman asks the Title X project to provide her with a list of abortion providers in the area. The Title X project tells her that it does not refer for abortion but provides her a list which includes, among other health care providers, a local clinic which principally provides abortions. Inclusion of the clinic on the list is inconsistent with paragraph (a)(3) of this section.

(4) A pregnant woman asks the Title X project to provide her with a list of abortion providers in the area. The project tells her that it does not refer for abortion and provides her a list which consists of hospitals and clinics and other providers which provide prenatal care and also provide abortions. None of the entries on the list are providers that principally provide abortions. Although there are several appropriate providers of prenatal care in the area which do not provide or refer for abortions, none of these providers are included on the list. Provision of the list is inconsistent with paragraph (a)(3) of this section.

(5) A pregnant woman requests information on abortion and asks the Title X project to refer her to an abortion provider. The project counselor tells her that the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion. The counselor further tells the client that the project can help her to obtain prenatal care and necessary social services, and provides her with a list of such providers from which the client may choose. Such actions are consistent with paragraph (a) of this section.

(6) Title X project staff provide contraceptive counseling to a client in order to assist her in selecting a contraceptive method. In discussing oral contraceptives, the project counselor provides the client with information contained in the patient package insert accompanying a brand of oral contraceptives, referring to abortion only in the context of a discussion of the relative safety of various contraceptive methods and in no way promoting abortion as a method of family planning. The provision of this information does not constitute abortion counseling or referral.

§ 59.9 Maintenance of program integrity.

A Title X project must be organized so that it is physically and financially separate, as determined in accordance with the review established in this section, from activities which are prohibited under section 1008 of the Act, and § 59.8 and § 59.10 of those regulations from inclusion in the Title X program. In order to be physically and financially separate, a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient. The Secretary will determine whether such objective integrity and independence exist based on a review of facts and circumstances. Factors relevant to this determination shall include (but are not limited to):

(a) The existence of separate accounting records;

(b) The degree of separation from facilities (*e.g.*, treatment, consultation, examination, and waiting rooms) in which pro-

hibited activities occur and the extent of such prohibited activities;

(c) The existence of separate personnel;

(d) The extent to which signs and other forms of identification of the Title X project are present and signs and material promoting abortion are absent.

§ 59.10 Prohibition on activities that encourage, promote or advocate abortion.

(a) A Title X project may not encourage, promote or advocate abortion as a method of family planning. This requirement prohibits actions to assist women to obtain abortions or increase the availability or accessibility of abortion for family planning purposes. Prohibited actions include the use of Title X project funds for the following:

(1) Lobbying for the passage of legislation to increase in any way the availability of abortion as a method of family planning;

(2) Providing speakers to promote the use of abortion as a method of family planning;

(3) Paying dues to any group that as a significant part of its activities advocates abortion as a method of family planning;

(4) Using legal action to make abortion available in any way as a method of family planning; and

(5) Developing or disseminating in any way materials (including printed matter and audiovisual materials) advocating abortion as a method of family planning.

(b) *Examples.* (1) Clients at a Title X project are given brochures advertising an abortion clinic. Provision of the brochure violates subparagraph (a) of this section.

(2) A Title X project makes an appointment for a pregnant client with an abortion clinic. The Title X project has violated paragraph (a) of this section.

(3) A Title X project pays dues to a state association which, among other activities, lobbies at state and local levels for the

passage of legislation to protect and expand the legal availability of abortion as a method of family planning. The association spends a significant amount of its annual budget on such activity. Payment of dues to the association violates paragraph (a)(3) of this section.

(4) An organization conducts a number of activities, including operating a Title X project. The organization uses non-project funds to pay dues to an association which, among other activities, engages in lobbying to protect and expand the legal availability of abortion as a method of family planning. The association spends a significant amount of its annual budget on such activity. Payment of dues to the association by the organization does not violate paragraph (a)(3) of this section.

(5) An organization that operates a Title X project engages in lobbying to increase the legal availability of abortion as a method of family planning. The project itself engages in no such activities and the facilities and funds of the project are kept separate from prohibited activities. The project is not in violation of paragraph (a)(1) of this section.

(6) Employees of a Title X project write their legislative representatives in support of legislation seeking to expand the legal availability of abortion, using no project funds to do so. The Title X project has not violated paragraph (a)(1) of this section.

(7) On her own time and at her own expense, a Title X project employee speaks before a legislative body in support of abortion as a method of family planning. The Title X project has not violated paragraph (a) of this section.

6. In addition to the amendments set forth above, in 42 CFR Part 59 remove the words "project" or "projects" or "project's" and add in their place, the words "Title X project" or "Title X projects" or "Title X project's," respectively, in the following places:

(a) Section 59.2 definition of "low income family";

(b) Section 59.5(a)(1);

(c) Section 59.5(b), introductory text;

(d) Section 59.5(b)(3)(iii);

(e) Section 59.5(b)(4);

(f) Section 59.5(b)(7);

(g) Section 59.5(b)(10);

(h) Section 59.6(a);

(i) Newly redesignated § 59.11(a);

(k) Newly redesignated § 59.11(a)(7);

(l) Newly redesignated § 59.11(b);

(m) Newly redesignated § 59.11(c);

(n) Newly redesignated § 59.12(a), the first time it appears;

(o) Newly redesignated § 59.15;

(p) Newly redesignated § 59.16(a).

. . . .

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 0701, 0702 (LLS)

THE STATE OF NEW YORK, *et al.*,

Plaintiffs,

—against—

OTIS R. BOWEN, Secretary of the United States Department of Health and Human Services,

Defendant.

DR. IRVING RUST, *et al.*,

Plaintiffs,

—against—

OTIS R. BOWEN, Secretary of the United States Department of Health and Human Services,

Defendant.

OPINION AND ORDER

Plaintiffs challenge final regulations promulgated on February 2, 1988 by the Department of Health and Human Services, which prohibit Title X projects[1] from counseling or referring

1 In 1970 Congress enacted the Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1506 (codified at 42 U.S.C. §§ 300-300a-8 (1982)). The Family Planning Services and Population Research Act is the popular name for Subchapter VIII of the Public Health and Welfare laws (which appear at Title 42 of the United States Code), and is commonly called Title X (referring to its designation as Title X of Chapter 373 of Public Law No. 91-572).

(*Footnote continues on following page*)

clients for abortion as a method of family planning, require Title X grantees to separate their projects, physically and financially, from any abortion activities, and prohibit Title X projects from encouraging, promoting or advocating abortion as a method of family planning. At a hearing on February 19, 1988 defendant was enjoined from enforcing the regulations with respect to these plaintiffs until further order. Both sides[2] have moved for summary judgment pursuant to Fed. R. Civ. P. 56.

There is no dispute about any of the facts material to the disposition of these motions.

BACKGROUND

1. The Parties

Plaintiff State of New York ("State") is a grantee of Title X funds through the New York State Department of Health ("NYSDOH"). In 1987-88, NYSDOH distributed nearly $6 million in Title X grants to 37 agencies. Plaintiff City of New York ("City"), through its Department of Health, provides technical and consultative services to Title X grantees in New York City. It brings suit on behalf of itself and the people of the City. Plaintiff New York City Health and Hospitals Corporation ("NYCHHC"), a public benefit corporation, is a principal provider of hospital services to the low income population of the City.

Plaintiff Dr. Irving Rust, an obstetrician and gynecologist, is the Medical Director of the Bronx Center, a facility of plaintiff Planned Parenthood of New York City, Inc. ("PPNYC"), and

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The new regulations provide that " 'Title X program' and 'Title X project' are used interchangeably and mean the identified program which is approved by the Secretary for support under section 1001 of the Act . . ." 53 Fed. Reg. 2922, 2944 (Feb. 2, 1988) (to be codified at 42 C.F.R. § 59.2). In this opinion the term "Title X grantee" is also used for the same purpose.

2 Motions to submit *amicus curiae* briefs on the Secretary's behalf by Senator Gordon J. Humphrey and Congressman Thomas J. Tauke, et al. and the American Academy of Medical Ethics, et al., and on plaintiffs' behalf by the American Medical Association, are granted.

plaintiff Dr. Melvin Padawer is the Medical Director of plaintiff Planned Parenthood of Westchester/Rockland ("PPWR"). As such, each supervises a Title X funded health care program.

PPNYC, a not-for-profit corporation, is the single largest provider of family planning services in the City, serving over 31,000 persons per year. PPNYC's Bronx Center, its only Title X-funded facility, receives a $439,391 Title X grant, amounting to 50% of its family planning budget. PPWR, composed of two not-for-profit corporations, operates seven clinics which provide a broad array of reproductive health care services throughout Westchester and Rockland counties. PPWR receives $325,000 from NYSDOH under Title X, which is 23% of its family planning budget. Plaintiff Health Services of Hudson County, New Jersey ("Hudson Health"), a provider of family planning, maternal and infant care, pregnancy testing, options counseling, and abortion services, receives a Title X grant of $148,674, which is 33% of its family planning budget. PPNYC, PPWR, and Hudson Health all sue on their own behalf, as well as for their staffs and patients. Although all three perform abortions at one or more of their locations, none uses Title X funds for that purpose.

Plaintiff Medical Health and Research Association of New York ("MHRA"), a not-for-profit organization, has received Title X grants since 1982. Its 1987 grant amounted to $2,104,950. MHRA, in turn, subgrants Title X funds to other organizations, including PPNYC. It also retains some Title X funds for its own service division, the Maternity, Infant Care—Family Planning Projects ("MIC-FPP"). MHRA sues on behalf of itself, MIC-FPP, and its patients.

Defendant Otis R. Bowen is the Secretary of the United States Department of Health and Human Services ("HHS") ("the Secretary"), and is authorized to make Title X grants "in accordance with such regulations as the Secretary may promulgate." 42 U.S.C. § 300a-4(a) (1982).

II. The Statute and Regulations

In enacting Title X, Congress sought "to make comprehensive, voluntary family planning services, and information relating thereto, readily available to all persons . . ." 116 Cong. Rec. 24094 (1970). Section 1008 of Title X provides:

> None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning. 42 U.S.C. § 300a-6 (1982).

The challenged regulations, appearing at 53 Fed. Reg. 2922 *et seq.* (Feb. 2, 1988) (to be codified at 42 C.F.R. §§ 59.2, 59.8, 59.9, 59.10) control the use of funds for family planning services and set specific standards for compliance with Title X.

In plaintiffs' view sections 59.2, 59.8, 59.9, and 59.10 frustrate Congressional intent, and violate Title X clients' First and Fifth Amendment rights and Title X health providers' First Amendment rights.

Section 59.2 adds new definitions. It defines "family planning" as

> the process of establishing objectives for the number and spacing of one's children and selecting the means by which those objectives may be achieved . . . including contraceptive methods . . . and the management of infertility . . . , preconceptional counseling, education, and general reproductive health care. . . . Family planning does not include pregnancy care (including obstetric or prenatal care).[3] As required by section 1008 of the Act, abortion may not be included as a method of family planning in the Title X project.

3 The separation between family planning (which occurs exclusively before pregnancy) on the one hand, and pregnancy, pre-natal and obstetric care (which naturally occur after conception) on the other, is a significant concept in the new regulations. It underlies the Secretary's views that abortion counseling has no function in family planning (abortion is irrelevant until after "planning" has failed), and that Title X programs deal with family planning, not pregnancy services or counseling for which they merely supply a list of references.

Section 59.2 also defines "project funds" to include "all funds allocated to the Title X program, including but not limited to grant funds, grant-related income or matching funds."

Section 59.8 ("the counseling and referral prohibition") sets forth the role of the Title X program after a woman is diagnosed as pregnant. To remain eligible for Title X grants, a project may not provide counseling or referral for abortion as a method of family planning. § 59.8(a)(1) Title X projects must refer every pregnant client for "appropriate prenatal and/or social services", furnish her with a "list of available providers that promote the welfare of mother and unborn child", and provide her "with information necessary to protect the health of the mother and unborn child until such time as the referral appointment is kept." § 59.8(a)(2). The list may not be used indirectly to encourage or promote abortion, such as by weighing the list in favor of health care providers who provide abortions: it may not include providers whose "principal business is the provision of abortions," exclude providers who do not provide abortions, or "steer" clients to providers who offer abortion as a method of family planning. § 59.8(a)(3) Information "medically necessary to assess the risks and benefits of different methods of contraception" may be provided, but again counseling about or promoting abortion as a method of family planning is prohibited. § 59.8(a)(4). Example 6 under section 59.8(b)(4), however, does allow a client to be provided with "information contained in the [oral contraceptive] package insert . . . , referring to abortion only in the context of a discussion of the relative safety of various contraceptive methods and in no way promoting abortion as a method of family planning."

Section 59.9 (the "separation requirement") requires the physical and financial separation of Title X projects from activities proscribed by section 1008 of Title X and sections 59.8 and 59.10. Satisfaction of the criterion, "objective integrity and independence from prohibited activity," will be determined by the Secretary on a case-by-case basis. Relevant factors include separate accounting records, facilities, personnel, signs, and other forms of identification. § 59.9(a)-(d)

Under section 59.10 a Title X project may not "encourage, promote, or advocate abortion as a method of family planning." § 59.10(a) Specifically prohibited activities include lobbying in support of pro-abortion legislation, providing pro-abortion speakers, paying dues to any group which advocates abortion, "using legal action" to make abortion available, and developing and disseminating materials advocating abortion. § 59.10(a)(1)-(5)

III. Questions Presented

Plaintiffs contend that these regulations violate the intent and letter of Title X. Further, they argue that sections 59.8 and 59.10 are viewpoint discriminatory, censor speech and impair a woman's fundamental right to informed reproductive choice, in violation of the First and Fifth Amendments.

The Secretary contends that these regulations implement "the Congressional command that no federal funds supporting Title X family planning projects be used to advance abortion as a method of family planning," (Defendant's Memorandum in Support of Summary Judgment, p.3) ("Defendant's Memorandum") and do not place unduly burdensome restrictions on protected rights. (*Id.* at 49)

In resolving these legal contentions, the court is not to consider the morality or wisdom of the regulations, nor to substitute its views for either the enactments of the legislature or the regulations of the Secretary. Those issues are grave and fervently debated, and convictions regarding them are conflicting and deeply held, and they should be settled at the polls where each voice can count. The court's duty in this case is narrow: to determine whether the regulations exceed or contravene the Secretary's authority under Title X and, if not, whether they infringe rights protected by the Constitution. Unlike the other two district courts which have reviewed the regulations[4], I conclude that they do not.

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4 The United States District Court for the District of Colorado preliminarily enjoined the Secretary from enforcing the regulations on February 18, 1988, *see Planned Parenthood Federation of America, et al. v. Bowen*, 680 F. Supp. 1465 (D. Colo. 1988), and entered a permanent injunction on June 15, 1988. The United States District Court for the District of Massachusetts entered a permanent injunction against enforcement of the regulations in *Commonwealth of Massachusetts, et al. v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988), *appeal pending*, 1st Cir. No. 88-1279. Both courts issued thoughtful opinions on questions presented by these cases.

DISCUSSION

I. Congressional Intent

The court's first inquiry is whether the regulations sufficiently accord with the intent of Congress.

A. Statutory Language

"The starting point for reviewing an agency's construction of a statute is the language of the statute." *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 839 F.2d 47, 52 (2d. Cir. 1988). As the Court stated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 843 n.11 (1984):

> If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, . . . the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."

At issue here is section 1008 of Title X which provides:

> None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.

Standing alone, that statutory language does not specifically control the questions addressed by the regulations: Can clients

be referred to or counseled about abortion services? To what degree must facilities which perform abortions or abortion-related services be separated from those eligible to receive Title X grants? May grantees of Title X funds use funds from other sources to engage in activities restricted by the regulations? Therefore the appropriate query is whether the new regulations are "based on a permissible construction" of Title X.

In making such a determination, the court looks to section 1008's legislative history, as well as Congress's and HHS's interpretations of section 1008 since its enactment. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 110-20 (1980).

B. Legislative History

Congress's enactment of Title X was not without lengthy testimony, detailed reports, and significant floor debate. The provisions of Title X which generated such discussion, however, almost exclusively concerned Congress's twin goals of making family planning services affordable and not coercing anyone to restrict the size of her family. Few comments addressed the matters now before the court, and those do not elaborate on Congress's intent regarding counseling and referral, or encouraging, promoting, and advocating abortion.

Plaintiffs argue that the Secretary's limitation on family planning services (i.e., that Title X's provision of services terminates upon pregnancy) contravenes congressional contemplation that "comprehensive" and "continuing" family planning services would be available for women of lower incomes, pointing to the Senate Report:

> The committee does not view family planning as merely a euphemism for birth control. It is properly a part of comprehensive health care and should consist of much more than the dispensation of contraceptive devices. . . . [A] successful family planning program must contain . . . medical services, including consultative examination, prescription, and continuing supervision, supplies, instruction, and referral to other medical services as needed. S. Rep. No. 1004, 91st Cong., 2d Sess., *reprinted in* 116 Cong. Rec. 24,094 (1970).

Although members of Congress vehemently declared that Title X funds would not support abortions[5], apparently none stated that Title X services would be limited to women who were not pregnant.

Plaintiffs also argue that HHS's separation requirement and definition of "project funds" diverge from Congress's vision that Title X programs would work hand-in-hand with state and local family planning services:

> It is, and has been, the intent of both Houses that the funds authorized under this legislation be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities. The conferees have adopted the language contained in section 1008, which prohibits the use of such funds for abortion, in order to make clear this intent. The legislation does not and is not intended to interfere with or limit programs conducted in accordance with State or local laws and regulations which are supported by funds other than those authorized under this legislation. Conf. Rep. No. 91-1667, 91st Cong., 2d Sess. 8-9 (1970).

They argue that the final sentence quoted above would allow grantees who receive support in addition to Title X funds (as all grantees must) to provide abortion-related services approved under local laws. That appears a permissible, although not a necessary, interpretation.

On balance, if these are discrepancies they do not appear of sufficient weight (when contrasted with the direct statutory lan-

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5 "[T]his legislation does not provide for abortions, contrary to some of the rumors apparently circulating concerning it" (116 Cong. Rec. 37367, remarks of Rep. Nelson); "I strongly support . . . the provision in the House version of this legislation that prevents this bill from being construed as support for abortion." (116 Cong. Rec. 37371, remarks of Rep. Pickle); Congress "wisely prohibited the use of any Federal funds in the bill from being used for abortion." (116 Cong. Rec. 37375, remarks of Rep. Broyhill); "With the 'prohibition of abortion' amendment—title X, section 1008—the committee members clearly intend that abortion is not to be encouraged or promoted in any way through this legislation." (116 Cong. Rec. 37375, remarks of Rep. Dingell).

guage) to compel the conclusion that the regulations are beyond the Secretary's broad authority. Only when Congress's intent is clear and certain can the regulations be enjoined on the basis of legislative history alone:

> "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. (footnotes omitted)

Chevron, 467 U.S. at 843-44.

C. Subsequent Legislation and Legislative Interpretations

Plaintiffs assert that since 1970 "Congress has retained the original language of section 1008" (Plaintiff Rust's Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, p. 19) ("Rust Memorandum") and "consistently defeated amendments meant to accomplish what the new regulations impose." (Plaintiff State's Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, p. 35) They say "amendments to Title X seeking to prohibit counseling, referral, or what has been called promotion or encouragement of abortion, have been introduced and rejected *seven* times." (Plaintiff Rust's Reply to Defendant's Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, p. 6) (emphasis in original).

Whereas "subsequent legislation declaring the intent of an earlier statute is entitled to significant weight," *National Labor Relations Board v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 275 (1974), this court is also mindful that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," *Consumer Product Safety Commission*, 447 U.S. at 117 (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

A thorough review of Congress's statements regarding Title X, and its treatment of proposed amendments over the past eighteen years, fails to sustain plaintiffs' assertions.

Title X's initial authorization for appropriations ran through fiscal year 1973. In that year, Congress passed the Health Programs Extension Act of 1973, Pub. L. No. 93-45, 87 Stat. 93, which extended Title X's funding for another fiscal year. Discussion of Title X was limited to one paragraph, concerning only the levels of current and proposed funding. *See* H. Rep. No. 93-227, 1973 Code Cong. & Admin. News 1464, 1472 (1973).

By a vote of 247 to 123, the House defeated the following proposed amendment to Title X's appropriation for fiscal year 1974:

> No part of the funds appropriated under this Act shall be used in any manner directly or indirectly to pay for abortions or abortion referral services, abortifacient drugs or devices, the promotion or encouraging of abortion, or the support of research designed to develop methods of abortion, or to force any State, school or school district or any other recipient of Federal funds to provide abortions or health or disability insurance abortion benefits. 120 Cong. Rec. 21,687-95 (1974)

The debate on this amendment sheds no light on the issues presented by the new regulations.

The Family Planning Services and Population Research Act of 1975, Pub. L. No. 94-63, 89 Stat. 304 authorized appropriations for Title X through fiscal year 1977. The House, with virtually no debate and no recorded vote, rejected an amendment to the appropriations bill forbidding Title X grantees to "pay

for abortions, or to promote or encourage abortions." 121 Cong. Rec. 20,863-64 (1975) The Senate Report stated that Title X's intent "was to greatly expand the availability of voluntary planning services with priority on low-income individuals." 1975 Code Cong. & Admin. News 469, 515. It explained that Title X programs offer both medical and social services including counseling, and stated the Committee on Labor and Public Welfare's belief "that provision of contraceptive services should be preceded by counseling about the consequences and significance of a decision to use contraceptives." *Id.* at 517. The Report also defined the requirement of informed consent to include:

> (1) a fair explanation of the procedures to be followed, including an identification of any which are experimental; (2) a description of any attendant discomforts and risks reasonably to be expected; (3) a fair explanation of the likely results should the procedure fail; (4) a description of any benefits reasonably to be expected; (5) a disclosure of any appropriate alternative methods or procedures that might be advantageous; (6) an offer to answer any inquiries concerning the procedures; and (7) an instruction that the subject is free either to decline entrance into a project or to withdraw his or her consent and to discontinue participation in the project or activity at any time without prejudicing future care. *Id.* at 524-25.

The Committee, although "generally impressed that [Title X] has worked very well," believed several sections "need[ed] strengthening and clarification." *Id.* at 521. Section 1008 was not among them.

In 1977, the Health Services Extension Act of 1977, Pub. L. No. 95-83, 91 Stat. 389, extended Title X's funding through fiscal year 1978.

When debate was held on Title X's reauthorization in 1978, Representative Dornan proposed the following amendment:

> No grant or contract authorized by this Title may be made or entered into with an entity which directly or indirectly

> provides abortion, abortion counseling, or abortion referral services. 124 Cong. Rec. 37045 (1978)

The sponsor of the reauthorization, Representative Rogers, argued that it was not necessary in light of section 1008's prohibition. The amendment was defeated.

The Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, *reprinted in* 1981 Code Cong. & Admin. News 396, 888, extended Title X's funding through 1984, and stated that Title X's services "include medical examinations, counseling, pregnancy tests, information and education activities, and birth control and infertility services."

The House Energy and Commerce Committee Report on the Extension of Title X in 1985 contained the following:

> Title X has included a prohibition on the use of family planning funds for abortion since its enactment in 1970. The Committee . . . is satisfied that Title X grantees are complying with this prohibition. Indeed, in 1984, Secretary Heckler testified before the Subcommittee on Health and the Environment that Title X's grantees 'have been very aware and have honored the law in terms of the abortion prohibition. . . .' The Committee, therefore, has overwhelmingly rejected proposed amendments that would affect the interpretation and implementation of this section and has chosen instead to re-affirm the language of the 1970 Conference Report, H. Rept. No. 91-1667 accompanying the original Title X legislation:
>
> > The Conferees have adopted the language in Section 1008, which prohibits the use of [Title X] funds for abortion, in order to make clear this intent. The legislation does not and is not intended to interfere with or limit programs conducted in accordance with State or local laws and regulations which are supported by funds other than those under this legislation.
>
> The Committee has renewed this prohibition in the belief that it is adequate. The Committee does not intend—and would discourage—regulatory efforts to modify restrictions that the Committee has chosen to retain. Previous

efforts to create restrictions beyond the original intent of the law have been unnecessary and without statutory foundation. H. R. Rep. No. 99-159, June 4, 1985, 6-7.

In 1985, Congress extended Title X's funding by continuing resolution. The House Report approved HHS's 1981 guidelines which provide for "non-directive" counseling. (see below) H.R. Rep. No. 403, 99th Cong., 1st Sess. 6 (1985). Since 1985 funding for Title X has been provided for by continuing resolution.

Thus, despite the interpretation of specific statements urged by the parties to support their views, it appears that no explicit guidance, or even illumination, is supplied by the legislature's subsequent treatment of Title X, at least as far as the issues in this case are concerned.

D. HHS Interpretations since 1970

"In addition to the importance of legislative history, a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change." *National Labor Relations Board*, 416 U.S. at 275. *Accord Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 462 U.S. 27, 42 (1983) ("agency's interpretation of a statute may be confirmed or ratified by subsequent congressional failure to change that interpretation") An agency, however, is not required "to establish rules of conduct to last forever." *Motor Vehicle*, 463 U.S. at 45.

Counseling and Referral Prohibition

Plaintiffs assert that HHS has "long interpreted the statute to allow Title X clinics to provide non-directive, unbiased counseling regarding the options available to pregnant women, including abortion, and when appropriate, to refer clients to abortion providers." (Rust Memorandum, p. 4)

A series of memoranda and letters[6] written by HHS[7] staff counsel during the 1970's discuss, and approve, non-directive counseling. See, *e.g.*, November 19, 1976 letter from Louise Hellman, Deputy Assistant Secretary for Population Affairs to Hilary Conner, Regional Health Administrator ("[Y]ou should not employ directive counseling in relation to abortions. A counselor working under the aegis of a physician, however, has not only a First Amendment right but duty to inform a patient of all legal options."); Memorandum of April 14, 1978 from HHS Senior Attorney Carol Conrad to Elsie Sullivan, Bureau of Community Health Services ("the provision of information concerning abortion services [and] mere referral of an individual to another provider of services for an abortion" is not prohibited); May 25, 1979 Memorandum from Louis Belmonte, Regional Program Consultant ("The provision of information on abortion services and the mere referral of a patient to another provider for such a procedure are permissible"); Memorandum of July 25, 1979 from Carol Conrad to Elsie Sullivan ("Section 59.5(d) requires referral to a provider who might recommend or provide an abortion because of the patient's medical condition or the condition of the fetus . . . where such a referral is necessary because of medical indications, abortion is not being considered as a method of family planning at all, but rather as a medical treatment . . ."). [8]

Further, the current [1981] HHS Program Guidelines For Project Grants For Family Planning Services (the "guidelines") provide:

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6 All appear in Plaintiffs' Joint Appendix to Memorandum of Law.

7 Before 1981, HHS was the Department of Health, Education and Welfare ("HEW"). All references to HHS in this opinion include, where applicable, HEW.

8 See also Memorandum of the Secretary of HHS as *amicus curiae* in *Valley Family Planning, et al. v. State of North Dakota*, 80-1471 (8th Cir. 1979) (Section 59.5(d) "includes a requirement for abortion referral services . . . In such circumstances [necessity or medically indicated], the Title X project could not, consistent with 42 CFR 59.5(d), refuse to refer the woman to another provider who would provide an abortion if in his or her own judgment it was medically indicated.")

> Pregnant women should be offered information and counseling regarding their pregnancies. Those requesting information on options for the management of an unintended pregnancy are to be given non-directive counseling on the following alternative courses of action, and referral upon request:
>
> - Prenatal care and delivery
> - Infant care, foster care, or adoption
> - Pregnancy termination

In short, HHS has significantly changed its longstanding interpretation of section 1008 with respect to referrals for abortion. Acknowledging this change, the Secretary justifies the new regulations as bringing Title X practices "into conformity with the language of the statute":

> Because counseling and referral activities are integral parts of the provision of any method of family planning, to interpret section 1008 as applicable only to the performance of abortion would be inconsistent with the broad prohibition against use of abortion as a method of family planning. 53 Fed. Reg. at 2923.

The Secretary argues that:

> Even if the abortion counseling and referral provided for by the current guidelines were not prohibited by the express language of section 1008 . . . [they] fail to offer 'clear and operational' guidance to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning. *Id.*

The Secretary's first assertion is tantamount to contending that section 1008 is only capable of one interpretation. As stated above, section 1008 does not speak to these issues unambiguously. However, that does not mean the new regulations do not give it a permissible construction.

The assertion that Title X grantees lack guidance rests upon comments received from Title X grantees in response to the Secretary's proposed rules, 52 Fed. Reg. 33210 (Sept. 1, 1987), and

reports written in 1982 by the General Accounting Office (GAO) and HHS's Office of the Inspector General. The GAO Report recommended that "the Secretary establish clear operational guidance by incorporating into the Title X program regulations and guidelines, HHS's position on the scope of the abortion restriction in section 1008." (Defendant's Memorandum, p. 16 (quoting GAO Report)) On the other hand, former HHS Secretary Heckler testified before the House Subcommittee on Health and the Environment in 1984 that "Title X grantees have been very aware and have honored the law in terms of the prohibition," H.R. Rep. No. 99-159, June 4, 1985. The present Secretary's disagreement with the conclusion reached by his predecessor, and his determination that HHS's current reading of section 1008 should be made clear, do not render the new regulations arbitrary or capricious. *Motor Vehicle*, 463 U.S. at 41.

2. Prohibition of Encouraging, Promoting or Advocating Abortion

HHS has consistently stated that Title X funds are not to be used to encourage, promote or advocate abortion. See, *e.g.*, Letter of November 19, 1976 from Louise Hellman to Hilary Conner ("if you are funded under Title X you cannot promote or encourage abortion"); Memorandum of April 14, 1978 from Carol Conrad to Elsie Sullivan (Section 1008 "prohibits activities which promote or encourage the use of abortion as a method of family planning . . . in the sense of encouraging persons to obtain abortions and the provision of transportation to persons to enable them to obtain abortions"); Memorandum of July 25, 1979 from Carol Conrad to Elsie Sullivan (a project may "make 'mere referrals' for abortion, so long as it does not then go on to promote or encourage use of the procedure for family planning purposes"). The Secretary points out that § 59.10 represents the "longstanding interpretation of section 1008 by this Department, of which the grantee community should be aware and is [sic] currently bound." 53 Fed. Reg. at 2942.

Only the restriction on "[p]aying dues to any group that as a significant part of its activities advocates abortion as a method

of family planning", § 59.10(a)(3), differs from HHS's earlier view as stated in the May 25, 1979 memorandum from Louis Belmonte ("participation in a national organization as a dues paying member, does not imply sufficient commitment to the federation's abortion activities, and thus it's allowable under Section 1008.") However, this minor departure from HHS's longstanding, general restrictions on lobbying and advocacy is not beyond the scope of the Secretary's broad discretion.

3. Separation Requirement

Some years after Title X's passage, HHS stated that "where a Title X grantee also conducts other activities which are not part of the grant-supported program and would not be permissible under the statute, . . . the grantee must ensure that the Title X-supported program is separate and is distinguishable from those other activities. Separate bookkeeping entries are not enough." (Memorandum of April 14, 1978 from Carol Conrad to Elsie Sullivan). But, "a hospital offering abortions for family planning purposes, consonant with state law" would not be barred from receiving Title X funds "for the operation of a separate family planning program which utilized only preventive family planning methods." (Memorandum of April 30, 1972 from Joel M. Mangel to Louis Hellman). Perhaps the clearest indication that HHS traditionally has not required Title X projects to be fully separate from facilities performing abortions or abortion-related services is the obvious: most Title X projects do share personnel and physical facilities with abortion clinics.

The new separation requirement, by requiring separate facilities and personnel, goes much further than prior HHS policy and imposes significant changes on Title X projects:

> Clinics with comprehensive reproductive health services and even large metropolitan hospitals cannot provide for the degree of separation called for by § 59.9. Many, if not most of such facilities have deliberately attempted to integrate services which are substantively related in the interest of efficiency and the overall convenience of staff and patients. . . . toward compliance with Title X's requirement of coordinated services and the maximization of limited financial resources.
>
> [Separate medical records mean that] the health professional in a Title X-funded program will routinely be forced to reach decisions regarding the provision of family planning treatment based on what may be an incomplete medical history. Declaration of Raymond Fink, Chairperson of MHRA.[9]

Nonetheless, the Secretary argues that unless separate facilities are maintained, Title X funds would in effect be subsidizing the performance of abortions and abortion-related activities. This determination, in light of section 1008's prohibition on using Title X funds in "programs where abortion is a method of family planning," is a permissible construction of the statute.

The foregoing review supports only the conclusions that (1) the new regulations do not offend the direction contained in section 1008; (2) nothing in the contemporaneous or subsequent legislative treatment of Title X shows with such clarity that the new regulations violate the legislative intent that they should be set aside; and (3) the new regulations, despite their significant changes from the guidelines, are supported by sufficiently reasonable grounds that they should not be set aside as arbitrary or capricious.

Accordingly, one must now turn to plaintiffs' claims that the regulations are unconstitutional.

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9 *See also* Declaration of Francine Stein, Executive Director of PPW/R (detailing the expenses of new facilities and the time required to obtain operating certificates); Declaration of Dr. Irving Rust (explaining that the "proximity of services and personnel" enables Title X program to counsel immediately post abortion patients "to encourage a responsible attitude toward sex and reproductive health"); Declaration of Lorraine Tiezzi, Director of family planning clinics at Presbyterian Hospital (although "[a]bortions are performed at Presbyterian Hospital on a separate floor", the "family planning clinic and abortion services are both part of the OB-GYN clinic, and thus share the same entrance, and waiting and reception areas" as well as patient records); Declaration of Marilyn Bennett, Executive Director of Hudson Health ("our family planning program would have to be physically separated from our maternal/infant program in which the option of abortion is often discussed following genetic counseling and amniocentesis").

II. Constitutional Claims

A. Counseling and Referral Prohibition; Prohibition of Encouraging, Advocating, or Lobbying of Abortion

Both the federal and state governments may "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds." *Maher v. Roe*, 432 U.S. 464, 474 (1977). As stated in *Harris v. McRae*, 448 U.S. 297, 314 (1980):

> The doctrine of *Roe v. Wade*, the Court held in *Maher*, "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy," *id.* at 473-474, 97 S. Ct. at 2382, such as the severe criminal sanctions at issue in *Roe v. Wade*, *supra*, or the absolute requirement of spousal consent for an abortion challenged in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 96 S. Ct. 2831, 49 L.Ed.2d. 788.
>
> But the constitutional freedom recognized in *Wade* and it progeny, the *Maher* Court explained, did not prevent Connecticut from making "a value judgment favoring childbirth over abortion, and . . . implement[ing] that judgment by the allocation of public funds." 432 U.S., at 474, 97 S. Ct., at 2382. As the Court elaborated:
>
> "The Connecticut regulation before us is different in kind from the laws invalidated in our previous abortion decisions. The Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantages as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the services she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation." *Ibid.*

In sum:

> There is a basic difference between direct state interference with a protected activity and state encouragement of an alternate activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader. *Maher v. Roe*, 432 U.S. at 475-76 (footnote omitted).

Here the question is whether the regulations interfere with constitutionally protected rights (claimed to be the Title X health providers' First Amendment right to counsel their patients and their patients' First and Fifth Amendment rights to receive information about abortion services) or simply allocate financial support to those who do not counsel about abortion but encourage childbirth.

Both *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 546 (1983) and *Lyng v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 108 S. Ct. 1184, 1190 (1988) "reject the notion that First Amendment rights are somehow not fully realized unless they are subsidized . . ." The Court cautioned, however, that "[t]he case would be different if Congress were to discriminate invidiously in such a way as to 'aim at the suppression of dangerous ideas.' " *Taxation With Representation*, 461 U.S. at 548. Plaintiffs argue that by requiring Title X grantees to supply pregnant clients with a list of prenatal care providers and forbidding them to counsel about abortion services, the new regulations are "selective prohibitions about what may be said [which] may not be viewed as a mere refusal to subsidize the exercise of rights." (Plaintiffs' Joint Response to Defendant's Second Notice of Recent Decision, p. 3)

The regulations reflect the Secretary's decision to favor childbirth over abortion and section 1008's requirement that no Title

X funds be used in programs where abortion is a method of family planning. Counseling women who seek family planning assistance, and who are not yet pregnant, about abortion treats abortion as a method of family planning. Congress has already forbidden funding for that purpose, a choice which can hardly be argued to have "interfered" with free speech.

More troubling is the Secretary's requirement that pregnant women be given a list, which may be biased in favor of providers of prenatal care, in response to their queries about abortion services. If that requirement were imposed upon all health care providers (whether or not supported by government funds) by law, or if any providers were penalized for speaking of abortions, that would constitute invidious discrimination of ideas. *Cf. Griswold v. Connecticut*, 381 U.S. 479 (1965). But here, the regulation simply defines who may, and who may not, receive Title X funds. The condition that federal funds will be given only to those who support particular views does not violate constitutional rights. *See, e.g., Taxation With Representation*, 461 U.S. at 548 ("Congress could, for example, grant funds to an organization dedicated to combating teenage drug abuse but condition the grant by providing that none of the money received from Congress should be used to lobby state legislatures.")

FCC v. League of Women Voters of California, 468 U.S. 364 (1984), on which plaintiffs rely, does not compel a different result. Striking a provision of the Public Broadcasting Act of 1967 forbidding any noncommercial educational radio or television station which receives grants from "engaging in editorializing," the Court stated:

> We do not hold that the Congress or the FCC is without power to regulate content, timing, or character of speech by noncommercial educational broadcasting stations. Rather, we hold only that the specific interests sought to be advanced by [the] ban on editorializing are either not sufficiently substantial or are not served in a sufficiently limited manner to justify the substantial abridgment of important journalistic freedoms which the First Amendment jealously protects. *Id.* at 403.

Thus, even where the First Amendment freedoms of a broadcasting medium whose sole purposes are the dissemination of ideas and public discussion of issues are at stake, neither Congress nor an agency is entirely "without power to regulate" content, timing, and character of speech.

The point here, however, is that HHS's regulations, which merely withhold grants of federal funds from those who wish to counsel women about abortion, refer them to abortion providers, or advocate, encourage or promote abortion in other ways, do not violate the rights of either such persons or their patients. The regulations do not prohibit or compel speech. They grant money to support one view and not another; but that is quite different from infringing on free speech.

B. Separation Requirement

The Secretary argues that the new regulations are "constitutional under the standards set forth in *Regan v. Taxation Without (sic) Representation, supra* and *League of Women Voters, supra*, because they do not prohibit organizations from establishing affiliates that provide abortion materials." *Id.* at 2942-43.

In *Taxation With Representation* the Court rejected a First Amendment challenge to an Internal Revenue Code section which prohibits use of tax-deductible contributions for lobbying. The Court noted that the organization could set up two groups: one to engage in lobbying, and another eligible for tax-deductible contributions for its nonlobbying activity. *Id.* at 544. The Court held that the IRS requirement "that the two groups [the lobbying division and the non-lobbying division] be separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying . . . . is not unduly burdensome." *Id.* at 544 n.6.

Maintaining separate signs, forms of identification, and accounting records, as in *Taxation With Representation*, does not impose unduly burdensome restrictions on Title X grantees. The requirements of separate personnel and facilities go considerably further than the separation requirements at issue in *Taxation With Representation* or those suggested in *League of*

Women Voters. However, the Secretary's view that these regulations are necessary to assure compliance with the other regulations is not unreasonable. Although the regulations do impose a burden upon Title X programs, the burden is not so excessive as to infringe plaintiffs' constitutional rights.

Nor do the regulations infringe upon the grantees' rights to exercise free speech in programs supported by funds from other sources. The Secretary declines to contribute funds to programs counseling about abortion. Title X grantees are free to engage in such programs, supported by funds from others, as long as those programs are kept separate from their Title X activities. That arrangement is valid. See *League of Women Voters*, 468 U.S. at 400.

> Of course, if Congress were to adopt a revised version of § 399 that permitted noncommercial educational broadcasting stations to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid under the reasoning of *Taxation With Representation*.

CONCLUSION

Plaintiffs' motion for summary judgment is denied, and defendant's motion for summary judgment is granted.

The Clerk will enter judgment dismissing the complaints, together with costs and disbursements as provided by law.

Dated: June 30, 1988
New York, New York

/s/ LOUIS L. STANTON
Louis L. Stanton
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 0701, 0702 (LLS)

THE STATE OF NEW YORK, et al.,

Plaintiffs,

—against—

LOUIS SULLIVAN, Secretary of the United States Department of Health and Human Services,

Defendant.

DR. IRVING RUST, et al.,

Plaintiffs,

—against—

LOUIS SULLIVAN, Secretary of the United States Department of Health and Human Services,

Defendant.

ORDER

Plaintiffs having moved, pursuant to Fed. R. Civ. P. 62(c), for an order staying enforcement of the challenged Title X regulations, 53 Fed. Reg. 2944-46 (Feb. 2, 1988), pending appeal of this court's decision, *State of New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988), and the court having considered the written submissions and oral argument of counsel and having rendered its decision in open court, and it appearing that (1) plaintiffs have established "a substantial possibility, although less than a likelihood, of success" on appeal, *Hayes v. City University of New York*, 503 F. Supp. 946, 963 (S.D.N.Y.

1981), (2) in the event of reversal, plaintiffs would have suffered substantial injury from enforcement of the regulations against them in the interim, and (3) in the event of affirmance, the Secretary will have suffered the loss of funds to an application which he regards as improper and a delay in the exercise of his right to put his own decisions into effect; however, the Secretary's predecessors made the grants which plaintiffs seek to preserve pending the determination of the appeal, and since they were considered appropriate before the current regulations were promulgated, the Secretary's and the public interest will not be substantially harmed by their continuation until the Court of Appeals for the Second Circuit reaches its decision in *State of New York v. Bowen*, No. 88-6204, and *Rust v. Bowen*, No. 88-6206, it is

ORDERED that plaintiffs' Title X grant award date is extended until twenty days after the Court of Appeals renders its decision in *State of New York v. Bowen*, No. 88-6204, and *Rust v. Bowen*, No. 88-6206, or until December 1, 1989, whichever occurs earlier.

Dated: September 5, 1989
New York, New York

/s/ LOUIS L. STANTON
Louis L. Stanton
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 575, 633—August Term, 1988

(Argued January 4, 1989 Decided November 1, 1989)

Docket Nos. 88-6204, 88-6206

THE STATE OF NEW YORK, THE CITY OF NEW YORK, THE NEW YORK CITY HEALTH & HOSPITALS CORP., DR. IRVING RUST, on behalf of himself, his patients and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

Plaintiffs-Appellants,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Defendant-Appellee.

Before:

KEARSE, CARDAMONE and WINTER,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Louis L. Stanton, *Judge*) upholding regulations promulgated by the Secretary of the Department of Health and Human Services implementing the prohibition in Title X of the Public Health Service Act, 42

U.S.C. §§ 300 *et seq.*, on the use of Title X funds in programs in which abortion is a method of family planning. We hold that the regulations: (i) are based on a permissible construction of the statute and are therefore within the Secretary's authority; and (ii) are constitutional.

Affirmed.

Judge Kearse dissents in part in a separate opinion. Judge Cardamone concurs in a separate opinion.

SUZANNE LYNN, Assistant Attorney General, Chief, Civil Rights Bureau, New York State Department of Law, New York, New York (Robert Abrams, Attorney General of the State of New York, Marla Tepper, Assistant Attorney General, New York, New York, of counsel), *for Plaintiff-Appellant The State of New York.*

RACHEL N. PINE, New York, New York (Janet Benshoof, Lynn Paltrow, Catherine Weiss, American Civil Liberties Union, New York, New York; Norman Siegel, Art Eisenberg, New York Civil Liberties Union, New York, New York; Laurie R. Rockett, Hollyer, Jones, Brady, Smith Troxwell, Barrett & Chira, New York, New York, of counsel), *for Plaintiffs-Appellants Dr. Irving Rust, Dr. Melvin Padawer, Medical and Health Research Association of New York City, Inc., Planned Parenthood of New York City, Inc., Planned Parenthood of Westchester/ Rockland, and Health Services of Hudson County, New Jersey.*

Peter Zimroth, Corporation Counsel, The City of New York, New York, New York (Lorna Bade Goodman, Assistant Corporation Counsel, Chief, Affirmative Litigation Division, Hillary Weisman, Assistant Corporation Counsel, The City of New York, New York, New York, of counsel), *for Plaintiffs-Appellants The City of New York and The City of New York Health and Hospitals Corporation.*

ALFRED MOLLIN, Attorney, Appellate Staff, Civil Division, Department of Justice, Washington, D.C. (John R. Bolton, Assistant Attorney General, John F. Cordes, Attorney, Appellate Staff, Civil Division, Department of Justice, Washington, D.C.; Rudolph W. Giuliani, United States Attorney for the Southern District of New York, New York, New York, Joel Mangel, Deputy Chief Counsel, Public Health Service, Carol Conrad, Attorney, Office of the General Counsel, Department of Health and Human Services, Washington, D.C., of counsel), *for Defendant-Appellee.*

(Kent Masterson Brown, Lexington, Kentucky, Michael Vaccari, New York, New York, and Clarke D. Forsythe, Americans United for Life Legal Defense Fund, Chicago, Illinois, of counsel, submitted a brief *in Support of Appellee* for amici curiae American Academy of Medical Ethics; Association of American Physicians & Surgeons; American Association of Pro Life Obstetricians and Gynecologists; American Association of Pro-life Pediatricians, National Doctors for Life, Christian Medical Society, Christian Medical Foundation, Alabama Physicians for Life, Physicians for Moral Responsibility, National Association of Pro-life Nurses, California Pro-life Nurses Association, Georgia Nurses for Life, Indiana Nurses Concerned for Life, Missouri Nurses for Life, New York State Nurses for Life, Inc., Pennsylvania Nurses for Life, Rhode Island Nurses for Life, Washington Pro-life Nurses Association, Southern Center for Law and Ethics, and Certain Fellows and Members of the American College of Obstetricians and Gynecologists and of the American Medical Association).

(Kirk B. Johnson, Edward B. Hirshfeld, American Medical Association, Chicago, Illinois, Ann E. Allen, American College of Obstetricians and Gynecologists, Washington, D.C., Jack R. Bierig, David F. Graham, Lynn D. Fleisher, and Richard D. Raskin, Sidley & Austin, Chicago, Illinois, of counsel, submitted a brief *in Support of Appellants* for amici curiae the American Medical Association, American College of Obstetricians and Gynecologists, and American Society of Human Genetics).

(Bruce S. Wolff, Charles S. Sims, Suzette Brooks and William S. Koenig, Proskauer Rose Goetz & Mendelsohn, New York, New York, of counsel, submitted a brief *in Support of Appellants* for amici curiae the American Public Health Association, the Association of State and Territorial Health Officers, the Association of Schools for Public Health, the American College of Physicians, the American Medical Student Association, the Association of Reproductive Health Professionals, the California Coalition of Nurse Practitioners, the Maryland Department of Health and Mental Hygiene, the National Association of Nurse Practitioners in Family Planning, the National Urban League, the Nurses Association of the American College of Obstetricians and Gynecologists, the Ohio Department of Health, the Wisconsin Nurse Practitioners in Reproductive Health, and Dr. Allan Rosenfield, Dean of the Columbia University School of Public Health).

(Jonathan Lang, Ann Barcher, Barry Ensminger, Janice Goodman, Mary Sue Henifin, Kent Hirozawa, Susan Waltman and Sheldon Oliensis, President, the Association of the Bar of the City of New York, New York, New York, of counsel, submitted a brief *in Support of Appellants* for amicus curiae the Committees on Civil Rights, Medicine and Law, and Sex and Law of the Association of the Bar of the City of New York).

(Julius L. Chambers, Charles S. Ralston, John C. Dubin, Sherrilyn A. Ifill and Charlotte B. Rutherford, NAACP Legal Defense and Educational Fund, Inc., New York, New York, of counsel, submitted a brief *in Support of Appellants* for amicus curiae NAACP Legal Defense and Educational Fund, Inc.).

(Nadine Taub, Rutgers University School of Law, Newark, New Jersey, Sarah E. Burns, Legal Director, NOW Legal Defense and Education Fund, New York, New York, John H. Hall, Walter J. Walsh and Joel Kosman, Debevoise & Plimpton, New York, New York, of counsel, submitted a brief *in Support of Appellants* for amici curiae NOW

Legal Defense and Education Fund, National Abortion Rights Action League, American Association of University Women, American Humanist Association, American Jewish Congress, Americans for Religious Liberty, Catholics for a Free Choice, Center for Population Options, Committee to Defend Reproductive Rights, Episcopal Women's Caucus, Equal Rights Advocates, Inc., National Abortion Federation, National Council of Jewish Women, National Emergency Civil Liberties Committee, National Organization for Women, National Women's Health Network, National Women's Political Caucus, Organization of Pan-Asian American Women, Public Citizen Health Research Group, United Church of Christ, Women's Equity Action League, Women's Law Project; Women's Legal Defense Fund, Young Women's Christian Association of U.S.A.).

(David M. Becker and Virginia A.S. Kling, Wilmer, Cutler & Pickering, Washington, D.C., of counsel, submitted a brief *in Support of Appellants* for amici curiae Representative Bill Green, Senators Barbara A. Mikulski, Lowell P. Weicker, Jr., Brock Adams, John H. Chafee, Alan Cranston, Howard M. Metzenbaum, Paul Simon, Robert T. Stafford, William S. Cohen, Daniel J. Evans, Bob Packwood, and Timothy E. Wirth, and Representatives Daniel K. Akaka, Les AuCoin, Julian C. Dixon, Vic Fazio, William H. Gray III, Steny H. Hoyer, William Lehman, Robert J. Mrazek, John Edward Porter, Martin Olav Sabo, Henry A. Waxman, Jim Bates, Rick Boucher, Cardiss Collins, Mickey Leland, James H. Scheuer, Ron Wyden, Gary L. Ackerman, Chester G. Atkins, Anthony C. Beilenson, Howard L. Berman, Sherwood L. Boehlert, Don Bonker, Barbara Boxer, George E. Brown, Jr., Albert G. Bustamante, Benjamin L. Cardin, Thomas R. Carper, George W. Crockett, Jr., Peter A. DeFazio, Ronald V. Dellums, Mervyn M. Dymally, Don Edwards, Lane Evans, Dante B. Fascell, Walter E. Fauntroy, Barney Frank, Bill Frenzel, Robert Garcia, Sam Gejdenson, Benjamin A. Gilman, Charles A. Hayes, James M. Jef-

fords, Nancy L. Johnson, Robert W. Kastenmeier, Joseph P. Kennedy II, Peter H. Kostmayer, Richard H. Lehman, Sander M. Levin, Mel Levine, John Lewis, Mike Lowry, Matthew G. Martinez, Robert T. Matsui, George Miller, John R. Miller, Jim Moody, Constance A. Morella, Bruce A. Morrison, Stephen L. Neal, Nancy Pelosi, Claude Pepper, Charles B. Rangel, Marge Roukema, Claudine Schneider, Patricia Schroeder, Christopher Shays, David E. Skaggs, Louise M. Slaughter, Lawrence J. Smith, Olympia J. Snowe, Stephen J. Solarz, Pete Stark, Gerry E. Studds, Edolphus Towns, Morris K. Udall, Ted Weiss, Alan Wheat, and Howard Wolpe).

(Mark E. Chopko, General Counsel and Helen M. Alvare, Attorney, United States Catholic Conference, Washington, D.C., of counsel, submitted a brief *in Support of Appellee* for amicus curiae the United States Catholic Conference).

(James Bopp, Jr., and Richard E. Coleson, Brames, McCormick, Bopp & Abel, Terre Haute, Indiana, of counsel, submitted a brief *in Support of Appellee* for amici curiae United States Senator Gordon J. Humphrey and United States Congressmen Thomas J. Tauke, Thomas A. Luken, Thomas J. Bliley, Dan Coats, Christopher H. Smith, Henry J. Hyde, Alan B. Mollohan, and Vin Weber).

WINTER, *Circuit Judge*:

This appeal involves the validity of regulations promulgated by the Secretary of Health and Human Services (the "Secretary"). The statutory authority for these regulations is Section 1008, 42 U.S.C. § 300a-6, of Title X of the Public Health Service Act, 42 U.S.C. §§ 300 to 300a-41 (1982 & Supp. V 1987) ("Title X"). Section 1008 states: "None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. The regulations in question were promulgated in early 1988 and constitute a divergence from past agency policy. The new regulations limit the activities of Title X grantee projects with regard to counseling and referral for abortion, require physical and financial separation of Title X projects from prohibited activities, and restrict advocacy concerning abortions by Title X projects.

In challenging the new regulations, plaintiffs raise three principal issues: (i) whether the regulations are consistent with Section 1008; (ii) whether the prohibition on counseling concerning abortion within Title X projects violates the First and Fifth Amendment rights of pregnant women; and (iii) whether the regulations on counseling and advocacy infringe the First Amendment rights of health care providers. We hold that the regulations in question are a permissible construction of the statute and do not violate the constitutional rights of women or Title X grantees.

BACKGROUND

The facts are not in dispute and are amply described in the district court opinion, *State of New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988), familiarity with which is assumed. A brief recounting will therefore suffice for purposes of this opinion. Title X of the Public Health Service Act, 42 U.S.C. §§ 300 to 300a-41 authorizes the Secretary to make grants to public and private nonprofit entities to establish and operate family planning projects. It is the single largest source of fed-

eral funding of family planning services. Appellants include a number of Title X grantees—the State of New York, which receives Title X funds through the New York State Department of Health; the City of New York; the New York City Health and Hospitals Corporation; Planned Parenthood of New York City, Inc.; Planned Parenthood of Westchester/Rockland; Medical and Health Research Association of New York City, Inc.; Health Services of Hudson County, New Jersey; and Dr. Irving Rust and Dr. Melvin Padawer, doctors who supervise Title X-funded programs, who are suing on behalf of themselves and their patients. The defendant is the Secretary of the Department of Health and Human Services.

The Secretary has the power to make Title X grants "in accordance with such regulations as [he] may promulgate." 42 U.S.C. § 300a-4(a). On February 2, 1988, the Secretary promulgated the regulations in question pursuant to Section 1008. The new regulations impact on counseling concerning abortion, geographic and administrative relationships between Title X grantees and those engaging in activities concerning abortion, and advocacy concerning abortion. There is little doubt that the new regulations were intended as a departure from prior administrative practice. While Title X funds were never permitted in the past to be used either to perform or to subsidize actual abortions, *see* 36 Fed. Reg. 18,465, 18,466 (1971) (codified at 42 C.F.R. § 59.5(a)(9) ("The project will not provide abortion as a method of family planning."); *see also* 42 C.F.R. § 59.5(a)(5) (1986), administrative interpretations at first permitted, and later required, Title X projects to provide information about, and referral for, abortions, including names and addresses of abortion clinics. *See* U.S. Dep't of Health, Educ. & Welfare, *Program Incentives for Project Grants for Family Planning Services* (Jan. 1976); U.S. Dep't of Health and Human Services, *Program Guidelines for Project Grants for Family Planning Services* § 8.6 (1981). Title X programs thus included "non-directive" counseling about abortion as a method of family planning. Abortion-related activities permissible under the earlier practice have been summarized as follows:

> [T]he provision of information concerning abortion services, mere referral of an individual to another provider of services for an abortion, and the collection of statistical data and information regarding abortion are not considered to be proscribed by § 1008. The provision of "pregnancy counseling" in the sense of encouraging persons to obtain abortions and the provision of transportation to persons to enable them to obtain abortions, on the other hand, are considered to be proscribed by § 1008. The test to be applied, then, appears to be whether the immediate effect of the activity in question is to encourage or promote the use of abortion as a method of family planning. If the immediate effect of the activity is essentially neutral as in the cases of mere referral or collection of statistical data, then the activity does not fall afoul of § 1008.

Memorandum from C. Conrad, Office of the General Counsel, Department of Health, Education and Welfare, to E. Sullivan (Apr. 14, 1978) (footnotes omitted) (reproduced in Brief of the Secretary of Health and Human Services as Amicus Curiae at Attachment B, *Valley Family Planning v. North Dakota*, 661 F.2d 99 (8th Cir. 1981) (No. 80-1471) [hereinafter Memorandum of Apr. 14, 1978].

The new regulations expressly prohibit those activities that "assist" a woman to obtain an abortion, while not interfering with the right to receive information about abortion from sources other than Title X projects. *See* 42 C.F.R. § 59.10 (1988); *see also* 53 Fed. Reg. 2941-42 (1988). The regulations thus curtail counseling, non-directive or not, by Title X projects concerning abortion. In attempting to "set specific standards for compliance with the statutory requirement that none of the funds appropriated under Title X may be used in programs where abortion is a method of family planning," 53 Fed. Reg. 2922 (1988), Section 59.8(a)(1) of the regulations states that "[a] Title X project may not provide counseling concerning the use of abortion as a method of family planning." 42 C.F.R. § 59.8(a)(1) (1988). Section 59.8(a)(3) goes on to explain:

> (3) A Title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by "steering" clients to providers who offer abortion as a method of family planning.

42 C.F.R. § 59.8(a)(3) (1988). The regulations thus allow a service provider to respond to a client's inquiry for information about abortion by furnishing the name of abortion providers, but only in a prescribed fashion. After a client is diagnosed as pregnant, "the project refers the woman for prenatal pregnancy care rather than providing 'options counseling,' which could violate section 1008 by influencing her choice toward abortion." 53 Fed. Reg. 2932 (1988). The discussion accompanying the new regulations explains that the limitations on "conscious weighting" of the referral lists does not prohibit the "inclusion of facilities, such as hospitals, in which abortions are performed if they are also major providers of prenatal care and other services and the referral is specifically made to the providers of prenatal care services." 53 Fed. Reg. 2938 (1988). The provision does, as noted, ban inclusion of providers whose "main function" is to provide abortions. *Id.*

Subsection (4) states that the regulations do not prohibit provision of information "medically necessary to assess the risks and benefits of different methods of contraception," provided no counseling with respect to abortion is furnished. 42 C.F.R. § 59.8(a)(4) (1988). Specifically, keeping on hand copies of the yellow pages that contain advertisements for and information on where to obtain an abortion, to be given to a client who asks for them, is permitted: "[K]eeping the yellow pages in the project office and provision of medical records to another medical provider would not be proscribed, as they are not actions that

directly 'assist' a woman to obtain an abortion." 53 Fed. Reg. 2942 (1988).[1]

The second area of change under the new regulations concerns "program integrity." Section 59.9 provides that "[a] Title X project must be organized so that it is physically and financially separate" and "must have an objective integrity and independence from prohibited activities." 42 C.F.R. § 59.9 (1988). The integrity and independence of Title X projects are to be evaluated on a case-by-case basis. That evaluation will take into account, *inter alia*, whether separate accounting records are maintained, whether facilities in which prohibited activities occur are physically separate from Title X facilities, and whether the personnel in the Title X project also serve in projects in which prohibited activities occur. 42 C.F.R. § 59.9(a)-(d) (1988).

The third area relates to advocacy concerning abortion. Section 59.10 prohibits the use of Title X funds for activities that "encourage, promote or advocate abortion," and sets forth the following guidelines, illustrated with examples:

> (a) A Title X project may not encourage, promote or advocate abortion as a method of family planning. This requirement prohibits actions to assist women to obtain abortions or increase the availability or accessibility of abortion for family planning purposes. Prohibited actions include the use of Title X project funds for the following:
>
> (1) Lobbying for the passage of legislation to increase in any way the availability of abortion as a method of family planning;

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1 I do not agree with my colleagues that the regulations at issue permit the "keeping," but not the "providing," of the yellow pages to a client who asks for them. The sentence they refer to is contained in the discussion accompanying the new regulations and uses the word "keeping," not as a limiting concept, but as a response to a criticism that the regulations would prohibit "even keeping copies of the telephone yellow pages which contain advertisements by abortion clinics." 53 Fed. Reg. 2922, 2941 (1988). I believe it fairly self-evident that this response makes no sense if the yellow pages may not be provided when requested, particularly since neither the regulations nor the discussion explicitly prohibits their provision upon request.

(2) Providing speakers to promote the use of abortion as a method of family planning;

(3) Paying dues to any group that as a significant part of its activities advocates abortion as a method of family planning;

(4) Using legal action to make abortion available in any way as a method of family planning; and

(5) Developing or disseminating in any way materials (including printed matter and audiovisual materials) advocating abortion as a method of family planning.

42 C.F.R. § 59.10(a) (1988).

Appellants filed two separate actions, *New York v. Bowen*, No. 88-0701, and *Rust v. Bowen*, No. 88-0702, later consolidated, seeking declaratory and injunctive relief to prevent implementation of the new regulations. Appellants argued that the new regulations violated the letter and intent of Title X and worked a deprivation of First and Fifth Amendment rights. In a thorough opinion, the district court rejected appellants' contentions and upheld the regulations. Despite the Secretary's departure from past interpretations, the district court found the new regulations to be supported by "sufficiently reasonable grounds that they should not be set aside as arbitrary or capricious." *State of New York v. Bowen*, 690 F. Supp. at 1272. Similarly, the district court found appellants' constitutional claims to lack merit, holding that the regulations did not impermissibly interfere with either patients' First and Fifth Amendment rights to receive information about abortion services, *id.* at 1272-74, or Title X grantees' First Amendment rights to engage in speech concerning abortion.

DISCUSSION

1. *Statutory Issues*

We first examine whether the regulations in question embody a construction of the statute that legitimately effectuates Congressional intent. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Under Title X, the Secretary is empowered to make grants and enter into con-

tracts "to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." 42 U.S.C. § 300(a). His discretion, however, is subject to the restriction of Section 1008 that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. We believe that Section 1008 authorizes the regulations in question.

Appellants contend that the statute proscribes only the providing for, or the funding of, the performance of abortions and that the Secretary may not prohibit abortion counseling. This is a highly strained construction of Section 1008. A principal function of grantees under Title X is to provide information or "counseling" as to a range of methods of family planning. A program that counsels use of a particular contraceptive device plainly treats that device as a "method of family planning." In this context, it would be wholly anomalous to read Section 1008 to mean that a program that merely counsels but does not perform abortions does not include abortion as a "method of family planning." Moreover, when Congress has sought to prohibit the use of federal funds to perform actual abortions, it has used language specifically tailored to that end. *See, e.g.*, Pub. L. No. 100-202, 101 Stat. 1329-99 (1987) ("Hyde Amendment" to appropriations act stating: "None of the Federal funds provided in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term . . . ."). In the present context, the natural construction of Section 1008 is that the term "method of family planning" includes counseling concerning abortion.

Nothing in the legislative history of Title X detracts from that conclusion. The Conference Report thus stated that "[i]t is, and has been, the intent of both Houses that the funds authorized under [Section 1008] be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities. The conferees have adopted the language contained in section 1008, which prohibits the use of such funds for abortion, in order to make clear this intent." Conf. Rep. No. 91-1667, 91st

Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 5080, 5081-82. The comments of a number of legislators similarly support the Secretary's position. *See, e.g.*, 116 Cong. Rec. 37,375 (1970) (remarks of Rep. Dingell) ("During the course of House hearings . . . there was some confusion regarding the nature of the family planning programs envisioned, whether or not they extended to include abortion as a method of family planning. With the 'prohibition of abortion' amendment—title X, section 1008—the committee members clearly intend that abortion is not to be encouraged or promoted in any way through this legislation."); 116 Cong. Rec. 37,371 (1970) (statement of Rep. Pickle) ("I strongly support . . . the provision in the House version of this legislation that prevents this bill from being construed as support for abortion.").

Appellants' contrary view of the legislative history is based entirely on highly generalized statements about the expansive scope of the family planning services intended to be provided by Title X grantees. *See, e.g.*, S. Rep. No. 1004, 91st Cong., 2d Sess. 3, *excerpted in* 116 Cong. Rec. 24,094 (1970) ("This legislation is designed to make comprehensive, voluntary family planning services, and information relating thereto, readily available to all persons in the United States desiring such services; to provide greatly increased support for biomedical, behavioral, and operational research relevant to family planning and population; to develop and disseminate information on population growth; and to coordinate and centralize the administration of family planning and population research programs conducted by the Department of Health, Education and Welfare."); *id.* at 10, 116 Cong. Rec. at 24,095-96 ("The committee does not view family planning as merely a euphemism for birth control. It is properly a part of comprehensive health care and should consist of much more than the dispensation of contraceptive devices."); 116 Cong. Rec. 37,370 (1970) (statement of Rep. Bush) ("Most important is that this legislation be recognized as . . . a health-care service mechanism and not a population control mechanism."); 116 Cong. Rec. 37,380 (statement of Rep. Kyros) ("[This legislation] will make an important contribution to the health of American mothers and

children. This bill will make family planning services available to low-income women who presently want and need but cannot afford them and will increase the federal role in population research."); 116 Cong. Rec. 24,093 (statement of Sen. Hart) (legislation "moves toward providing much needed medical family planning services to millions of women who cannot afford them, and it provides for the research that will help us better to understand the phenomena of population growth and enable all couples to regulate fertility according to their individual conscience"). Whatever force such generalized statements might have in the absence of Section 1008, however, they do not specifically mention counseling concerning abortion as an intended service of Title X projects, and they surely cannot be read to trump a section of the statute that specifically excludes it. *See Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America*, 325 U.S. 161, 168-69 (1945) (general remarks not probative of Congressional intent on narrow issue).

Similarly, we are unpersuaded that subsequent refunding of Title X by later Congresses is significant in the instant case. *Cf. Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190-93 (1978) (subsequent appropriation irrelevant to previously enacted substantive law). Congress has not reenacted Title X, and the reauthorization of funding[2] does not imply that Congress was aware of, much less endorsed, every expenditure of funds by the agency. Reauthorization, for example, may simply imply acquiescence in the exercise of discretion by the agency. General statements by members of Congress at the time of refunding, *see, e.g.*, 119 Cong. Rec. 9593 (1973) (statement of Sen. Pell) (urging extension of funding and noting that "these programs seem to be working well"); 124 Cong. Rec. 31,252 (1978) (state-

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2 Title X was extended through fiscal year 1974 by Pub. L. No. 93-45, 87 Stat. 91 (1973). It was reauthorized in 1975, Pub. L. No. 94-63, 89 Stat. 304 (1975); again in 1977, Pub. L. No. 95-83, 91 Stat. 383 (1977); again in 1978, Pub. L. No. 95-613, 92 Stat. 3093 (1978); again in 1981, Pub. L. No. 97-35, 95 Stat. 358 (1981); and again in 1984, Pub. L. No. 98-512, 98 Stat. 2409 (1984). *See* H.R. Rep. No. 159, 99th Cong., 1st Sess. 2 (1985) (summarizing history). Since 1985 the Title X program has been funded through a series of continuing resolutions.

ment of Rep. Rogers), are similarly unenlightening. Moreover, " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)). "[E]ven when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. at 118 n.13.

In addition, the rejection by Congress of proposed amendments to Title X specifically prohibiting funds for counseling and referral for abortion, *see* H.R. Rep. No. 159, 99th Cong., 1st Sess. 6-7 (1985); 124 Cong. Rec. 37,045-46 (1978), is not helpful to interpretation because Congress may have believed that the statute already provided for such a result. *See* 124 Cong. Rec. 37,046 (1978) (statement of Rep. Rogers) ("[T]he point of what we are doing in title X . . . is to let people know how to avoid pregnancy. We cannot use any funds for abortion. The amendment is not needed."); *see also* 120 Cong. Rec. 21,688 (1974) (remarks of Rep. Roncallo); 124 Cong. Rec. 31,238 (1978) (statement of Rep. Rogers) ("simple extension" of Title X is not a "pro-abortion vote"). Finally, the existence of a lengthy political debate in Congress over the last several years on the general subject of funding for counseling and referral for abortion, *see* Appellants' Br. at 35-36, is not a reason for courts to alter their interpretation of Title X as enacted.

Appellants next argue that the Secretary is bound by prior administrative constructions of the statute and may not, therefore, promulgate regulations diverging significantly from past practice, even if the Secretary determines that practice was at odds with Congressional intent. The fact that an agency is departing from a long-held prior interpretation is of course an item to be taken into account by a court reviewing agency actions. Such a departure does not of course entitle a court to eschew all deference to the agency's judgment. Indeed, the Supreme Court has directly held that courts must show some deference to a rescission or modification of regulations as well as to an agency's initial interpretation. *Motor Vehicle Mfrs.*

Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41 (1983). In *American Trucking Ass'n v. Atchison, Topeka & S.F. Ry. Co.*, 387 U.S. 397 (1967), for example, the Supreme Court upheld the authority of the Interstate Commerce Commission to alter an interpretation of a statute that it had followed for some twenty-five years on the ground that it had decided that interpretation was incorrect. The Court remarked that an agency "faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice." 387 U.S. at 416. Similarly, in *Chevron*, the Supreme Court rejected the argument that an agency's interpretation "is not entitled to deference because it represents a sharp break with prior interpretations of the [statute in question]." *Chevron*, 467 U.S. at 862. Such revised interpretation deserves deference because "[a]n initial agency interpretation is not instantly carved in stone" and "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863-64.

We recently applied these principles in *Securities Indus. Ass'n v. Board of Governors of the Federal Reserve System*, 839 F.2d 47 (2d Cir.), *cert. denied*, 108 S. Ct. 2830 (1988), in which we upheld an outright reversal of regulatory policy based on the Federal Reserve Board's reevaluation of the Congressional scheme embodied in the Glass-Steagall Act, 12 U.S.C. §§ 24(Seventh), 78, 377-78 (1982 and Supp. V 1987). We held that that Act provided the Federal Reserve Board with adequate authority to allow bank holding-company subsidiaries to deal in certain securities notwithstanding a long-existing, previously unchallenged regulatory prohibition on such dealing. In the instant case, the Secretary has concluded that prior policy failed to implement the statute. *See* 53 Fed. Reg. 2923 ("Upon review of the guidelines, however, the Department for several reasons no longer believes that these [past] approaches were correct."). As noted above, we believe that the language and history of Title X are fully consistent with the regulations challenged in the instant case. Even if less than the customary deference is

accorded the Secretary in light of prior administrative construction, the regulations before us must be upheld.

Turning to the program integrity regulations, appellants contend that the separation requirements of Section 59.9 of the regulations, mandating separate facilities, personnel and records, frustrate the intent of Congress that Title X programs be an integral part of a broader health care system. They argue that such integration is impermissibly burdened because the efficient use of non-Title X funds by Title X grantees will be adversely affected by the regulations. For support, they rely principally on the generalized language in the House Conference Report that "[t]he legislation does not and is not intended to interfere with or limit programs conducted in accordance with State or local laws and regulations which are supported by funds other than those authorized under this legislation." Conf. Rep. No. 1667, 91st Cong., 2d Sess. 6, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5080, 5082. The argument proves too much, however, because it contemplates that non-federal grantors can override specific restrictions embodied in federal legislation.

Moreover, the Secretary could reasonably conclude that a degree of separation beyond arbitrary bookkeeping entries between Title X projects and projects counseling or performing abortions is necessary if Section 1008's restriction is to be given any meaning in practice. Indeed, the new separation requirements are hardly a major departure from past administrative construction. For example, in 1978, the Department of Health and Human Services' predecessor agency acknowledged that "the grantee must insure that [a] Title X-supported program is separate and distinguishable from those other [abortion-related] activities. Separate bookkeeping entries are not enough." Memorandum of Apr. 14, 1978, *supra*, at 5. We believe the new regulations fit comfortably within that policy. Finally, the new regulations, as described earlier, provide flexibility in requiring a case-by-case evaluation of compliance by Title X projects. 53 Fed. Reg. 2940. We thus conclude that the separation requirements are within the Secretary's authority based on a valid construction of the statute. *See State of New York v. Bowen*, 690 F. Supp. at 1267, 1271-72.

We need say little to dispose of appellants' contention that the regulations are arbitrary and capricious, as that test is functionally equivalent to the reasonableness test of *Chevron*, 467 U.S. at 843-45.

2. *Constitutional Issues*

Appellants also argue that the counseling and advocacy regulations are unconstitutional on several grounds. First, they assert that the regulations impermissibly burden a woman's privacy right to an abortion. Second, they contend that the regulations violate the First Amendment. On both points, however, Supreme Court precedent is to the contrary.

With regard to the right of privacy, the Supreme Court has held that government has no constitutional obligation to subsidize an activity merely because the activity is constitutionally protected. *See, e.g., Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring). The Court has specifically held, moreover, that government may validly choose to favor childbirth over abortion and to implement that choice by funding medical services relating to childbirth but not those relating to abortion. In *Maher v. Roe*, 432 U.S. 464 (1977), the Court upheld a statute that provided Medicaid recipients with payments for medical services related to childbirth but denied such payments for nontherapeutic abortions. In doing so, it noted that "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." 432 U.S. at 475. It also noted that the constitutional right of privacy recognized in *Roe v. Wade*, 410 U.S. 113 (1973) "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." 432 U.S. at 474. In *Harris v. McRae*, 448 U.S. 297 (1980), the Court upheld the constitutionality of the Hyde Amendment, which denies public funds for some medically necessary abortions. The Court explained that that provision "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abor-

tion and other medical services, encourages alternative activity deemed in the public interest." *Id.* at 315.

The Supreme Court had occasion to revisit *Maher* and *McRae* in its recent decision in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989). In *Webster*, the Court upheld against a variety of constitutional challenges a Missouri statute providing *inter alia* that no public facilities or employees be used to perform abortions and that physicians conduct viability tests prior to performing abortions.

The Court reaffirmed the vitality of the *Maher-McRae* line of cases in its discussion of the Missouri statute's prohibition on the use of public resources for the performance of abortions, quoting its decision in *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998 (1989), to explain that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Webster*, 109 S. Ct. at 3051 (quoting *DeShaney*, 109 U.S. at 1003).

The Court of Appeals in *Webster* had ruled that Missouri's proscription on the use of public facilities or employees in abortion services ran afoul of *Roe v. Wade* because it "prevent[ed] access to a public facility" and therefore "clearly narrow[ed] and in some cases foreclose[d] the availability of abortion to women." *Reproductive Health Service v. Webster*, 851 F.2d 1071, 1081 (8th Cir. 1988). The Supreme Court disagreed, stating that the Court of Appeals' analysis was not materially different from the argument rejected in *Maher* and *McRae*. *Webster*, 109 S. Ct. at 3052. "As in those cases," the Court stated, "the State's decision here to use public facilities and staff to encourage childbirth over abortion 'places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy.' " *Id.* (quoting *McRae*, 448 U.S. at 315). Because the funding restrictions upheld in *McRae* and *Maher* were constitutionally permissible despite their potential limits upon the choices of women seeking abortions, the Court found that "it strains logic" to suggest that a similar restriction on the use of public facilities and employees would be constitutionally infirm, *id.*, and pointed out that "[i]f the State may 'make a

value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds,' surely it may do so through the allocation of other public resources, such as hospitals and medical staff." *Id.* (citation omitted) (quoting *Maher*, 432 U.S. at 474).

We do not disagree with our dissenting colleague that the regulations in question may hamper or impede women in exercising their right of privacy in seeking abortions. *Webster*, however, emphasized that so long as no affirmative legal obstacle to abortion services is created by a denial of the use of governmental money, facilities, or personnel, the practical effect of such a denial on the availability of such services is constitutionally irrelevant. Certainly, an outright prohibition on the performance of any particular medical procedure in public hospitals or clinics will, if they constitute a substantial portion of such facilities in a local market, make provision of the particular service more expensive and less available. In *Webster*, Missouri denied the provision of abortion services in all public facilities, including hospitals, in order to "encourage childbirth over abortion." 109 S. Ct. at 3052. This seems to us a prohibition substantially greater in impact than the regulations challenged in the instant matter. Since these regulations create no affirmative legal barriers to access to abortion, therefore, *Webster* clearly refutes the privacy claims raised by plaintiffs.[3] For these reasons, we also believe that *Webster* cannot be reconciled with the recent decision of the First Circuit in *Massachusetts v. Secretary of Health and Human Servs.*, No. 88-1279, slip op. at

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3 Title 42 C.F.R. § 59.8(a)(3) (1988) prohibits Title X providers from "excluding available providers who do not provide abortions." This language was not intended to prevent a Title X grantee from excluding a facility that it regards as medically unsound for reasons other than its failure to provide abortions. As the discussion accompanying the regulations makes clear, the language was intended only to prevent "the deliberate exclusion in the composition of the list of providers that do not provide abortions or referrals for abortion." 53 Fed. Reg. at 2938. Title 42 C.F.R. § 59.8(b)(4) prohibits the exclusion of "appropriate providers which do not provide or refer for abortions." The word "appropriate" leaves room for judgments as to the medical worthiness of such providers and the portion of the discussion quoted above applies to (b)(4) as well.

26-40 (1st Cir. May 8, 1989) (holding regulations unconstitutional because they pose an obstacle to abortion), *opinion withdrawn and en banc rehearing granted*, (order of Aug. 9, 1989).

With regard to speech rights,[4] the Secretary's implementation of Congress's decision not to fund abortion counseling, referral or advocacy also does not, under applicable Supreme Court precedent, constitute a facial violation of the First Amendment rights of health care providers or of women. The Court has extended the doctrine that government need not subsidize the exercise of fundamental rights to speech rights. In *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), a nonprofit group, Taxation with Representation ("TWR"), claimed that the prohibition against substantial lobbying by organizations exempt from tax under I.R.C. § 501(c)(3) imposed an "unconstitutional condition" on the receipt of tax-deductible contributions. The Supreme Court, in rejecting this contention, stated:

> The [Internal Revenue] Code does not deny TWR the right to receive deductible contributions to support its nonlobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public moneys. This Court has never held that Congress must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right.

461 U.S. at 545. It again noted that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Id.* at 549. "The reasoning of these decisions is simple: 'although government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech],

4 One of the provisions of the Missouri statute at issue in *Webster* prohibited the use of public funds, personnel or facilities for the purpose of "encouraging or counseling" a woman to have an abortion not necessary to save her life, and the *Webster* plaintiffs had attacked that section of the statute on First Amendment grounds in the Court of Appeals. *See Reproductive Health Service v. Webster*, 851 F.2d 1071, 1078 (8th Cir. 1988). Plaintiffs, however, abandoned that claim before the Supreme Court, rendering the question moot, so we do not have the benefit of an explicit decision on the First Amendment issues implicated there.

it need not remove those not of its own creation." *Id.* at 549-50 (quoting *McRae*, 448 U.S. at 316); *see also DKT Memorial Fund v. Agency for Int'l Dev.*, No. 88-5243, slip op. at 23-38 (D.C. Cir. Oct. 10, 1989) (abortion-related restrictions on use of funds by international population planning program upheld as mere refusal to subsidize particular exercise of speech rights).

In addition, appellants argue that the restrictions on the subsidization of speech contained in the regulations are impermissible because the government may not condition receipt of a benefit on the relinquishment of constitutional rights. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Taxation With Representation*, 461 U.S. at 545. This case is distinguishable from *Perry*, however, because individuals employed by Title X projects remain free to say whatever they wish about abortion outside the Title X project. *See* 42 C.F.R. § 59.10(b)(6), (7) (1988). *Perry*, by contrast, involved a situation in which an individual was penalized precisely for exercising First Amendment rights outside the scope of his employment.

We do not regard the "program integrity" regulations as permitting the Secretary to deny funding to health care providers because they employ personnel who perform or counsel abortions outside their employment by the Title X grantee. *Cf. Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3052 n.8 (1989) ("This case might . . . be different if the State barred doctors who performed abortions in private facilities from the use of public facilities . . . ."). Although "[t]he existence of separate personnel" may be considered under 42 C.F.R. § 59.9(c) (1988) in determining whether Title X facilities are in fact separate from, and independent of, abortion-related facilities, the Secretary must consider numerous other factors, including distinct accounting records, physical separation, and the degree to which signs and other written indicia denote the two as separate facilities. 42 C.F.R. § 59.9 (1988). Thus "[w]here sharing of personnel exists, but the project can demonstrate on an overall basis that it is objectively separated from prohibited activities, the Department will determine that the project is in compliance with § 59.9." 53 Fed. Reg. at 2941. In addition, the regulations do not authorize the Secretary to take

the non-Title X employment activities of personnel into account in determining whether to grant a facility Title X status.

Our dissenting colleague relies upon *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) and *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983). These cases, however, involved laws that regulated the flow of information from doctors to patients without regard to whether public funds were being used. Given the numerous Supreme Court decisions discussed *supra* that distinguish between direct regulation and conditions on public funding, neither *Thornburgh* nor *City of Akron* control the present action. *See also DKT Memorial Fund*, slip op. at 23-24.

We also note that the decision in *Republican Nat'l Comm. v. Federal Election Comm'n*, 487 F. Supp. 280 (S.D.N.Y. 1980) [hereinafter *RNC*], *certified questions answered*, 616 F.2d 1 (2d Cir. 1980), *aff'd*, 445 U.S. 955 (1980), supports our conclusion. In *RNC*, plaintiffs argued that conditioning the public funding of a presidential campaign on the observance of limits on expenditures, held to be unconstitutional in *Buckley v. Valeo*, 424 U.S. 1 (1976), deprived candidates and their supporters of their First Amendment rights. The three-judge district court held that "[w]hile Congress may not condition benefit on the sacrifice of protected rights, the fact that a statute requires an individual to choose between two methods of exercising the same constitutional right does not render the law invalid, provided the statute does not diminish a protected right." 487 F. Supp. at 284-85 (citations omitted). In the instant case, potential grantees may seek funding from the states or other governmental units or from private sources as well as from the federal government, subject only to the separation requirements described above. In contrast, *RNC* upheld a statutory scheme in which candidates are compelled to select either exclusively public or exclusively private funding. Moreover, under *RNC*, the candidates' choice is further circumscribed because the alternative of private fundraising is subject to stringent limits on the size of permissible contributions. *See* 2 U.S.C. § 441a (1988). Title X does not compel any such one-or-the-other choice and is

not accompanied by statutory constraints on alternative sources of funding.

Finally, we add two qualifications. First, the present action does not pose the issues that might arise if a doctor were to treat private patients in an entity that receives Title X funds. In such a situation, the regulations limiting the role of Title X clinics with regard to abortion might be read to preclude the physician from giving advice concerning abortions to a patient who was in the clinic, not to take advantage of the services it offers as a Title X grantee, but to see her regular doctor. This issue appears to have been raised in *Webster* with regard to physicians in state-supported hospitals but mooted before the Supreme Court decision. *See supra* note 4; *Reproductive Health Services v. Webster*, 662 F. Supp. 407, 427-28 (W.D. Mo. 1987). Whether this issue arises in the context of Title X clinics is not clear on the present record, and we do not reach it.

Second, we note that the regulations in question do not facially discriminate on the basis of the viewpoint of the speech involved. The regulations require that requests for information on abortion be answered by the factual statement that the particular program does not include it as a family planning method and that only pre-natal services other than abortion are offered. Argumentation pro or con as to the advisability of an abortion for a particular woman is neither required nor authorized. The woman is thus under no pressure as a result of the regulations to accept or reject the services offered. Nor do the regulations in any way suggest that Title X funds may be used for public anti-abortion advocacy. Should the actual effect of the regulations be otherwise, the issues raised thereby can be resolved on a proper record.[5]

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5 For these reasons, we again disagree with the decision in *Massachusetts v. Secretary of Health and Human Servs.*, No. 88-1279, slip op. at 41-43 (1st Cir. May 8, 1989) (holding that regulations violate First Amendment), *opinion withdrawn and en banc rehearing granted*, (order of Aug. 9, 1989).

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

CARDAMONE, *Circuit Judge*, concurring:

I concur in Judge Winter's thorough opinion to affirm because I agree that the regulations promulgated by the Secretary are permissible under Title X, and are not constitutionally infirm. If experience under the regulations proves otherwise, a challenge may later be raised and resolved. I write separately to express two concerns.

The first concern is directed at the regulation requiring the Secretary to consider "[t]he existence of separate personnel" as a factor in determining the "objective integrity and independence [from abortion-related facilities]" of Title X facilities. *See* 42 C.F.R. § 59.9(c) (1988). This factor allows the Secretary in allocating Title X funding to consider whether Title X health-care providers perform or counsel abortions outside of their employment. The concern this raises is whether the Secretary may withhold funding from health-care providers based upon their exercise of First Amendment rights outside the scope of their Title X employment; a course of action explicitly found unconstitutional in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *see also Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3052 n.8 (1989) ("This case might . . . be different if the State barred doctors who performed abortions in private facilities from the use of public facilities . . . .").

Despite my concerns under *Perry*, I do not believe § 59.9(c) is constitutionally unsound. The regulation's plain language indicates that the Secretary will consider the existence of separate personnel in conjunction with several other factors: the maintenance of distinct accounting records, the physical separation of facilities, and the degree to which signs and other written indicia denote the two as separate facilities. Thus, "[w]here sharing of personnel exists, but the project can demonstrate on an overall basis that it is objectively separated from prohibited activities, the Department will determine that the project is in compliance . . . ." 53 Fed. Reg. 2922, 2941 (1988). In addition, there is no evidence in the record before us that the Secretary has relied or intends to rely upon the non-Title X employment activities of personnel in determining whether to grant a facility Title X status.

The second concern relates to the regulations insofar as they do not permit Title X attending physicians to provide the Yellow Pages found in an ordinary telephone book to a patient requesting information about health-care providers who perform and counsel patients regarding abortions. The Secretary's oral and written interpretations of the regulations state that Title X grantees may "keep[ ]" but not "provi[de]" the Yellow Pages. *See* 53 Fed. Reg. 2922, 2942 (1988). In addition, the plain language of § 59.8(a)(3) prohibits the inclusion of "health care providers whose principal business is the provision of abortions" in referral lists given to patients. Because such facilities are listed in the Yellow Pages, this regulation bars their use as a reference source for Title X patients.

Under the regulations, a Title X physician's hands are tied with respect to the response he or she may give to a patient seeking abortion information. Crafting the regulations in this fashion constitutes a trap for the mostly unsophisticated and unwary patients,[1] and jeopardizes the ability of Title X physicians to safeguard the health of those seeking their expert advice. For example, a Title X grantee *must* refer patients to facilities that do not perform or counsel abortions, *see* 42 C.F.R. § 59.8(a)(3) & (b)(4) (1988), regardless of whether the grantee believes the facility is sound medically or not. Moreover, the list must include *all* such facilities because the Secretary has ruled that excluding *any* such provider is inappropriate

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1 It has been said that Title X, as the single largest federally-funded family planning program, serves 4.3 million people: its targeted population consists of an estimated 14.5 million women at risk of unintended pregnancy, including 5 million adolescents between the ages of 15 and 19, and 9.5 million adult women between the ages of 20 and 44, all of whom have an income 150 percent below the poverty level. Note, *The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights?*, 41 Stan. L. Rev. 401, 408 (1989).

under Title X. The dilemma that comes to mind occurs when the Title X grantee knows that a health-care provider that does not perform or counsel abortions is—in the physician's opinion—not medically of high quality, but must nonetheless list that facility as a proper reference to a patient seeking the grantee's advice.

When faced with a somewhat analogous predicament, the Supreme Court, addressing the issue of what information must be supplied by a physician to facilitate a patient's "informed consent," declined to define the information provided by the physician narrowly. Rather the Court required only that the physician indicate "what would be done and . . . its consequences" because a more detailed definition "might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession." *Planned Parenthood v. Danforth*, 428 U.S. 52, 67 n.8 (1976).

It strikes me that a regulation allowing the Yellow Pages to be "kept" but not "provided" is a small and petty contrivance, inconsistent with our nation's high principles. Hence, although I vote to affirm because the subject regulations meet the letter of the law, I must say that in my view they fall woefully short of the tolerant spirit that gave birth to and should continue to animate our constitutional system.

KEARSE, *Circuit Judge*, dissenting in part:

I respectfully dissent from so much of the judgment as upholds the new regulations promulgated by the Secretary of Health and Human Services with respect to abortion counseling and referrals. Even assuming that the Secretary's new interpretation of Title X, 42 U.S.C. §§ 300 et seq. (1982 & Supp. V 1987), is entitled to deference, I view these regulations as arbitrary and capricious and as violative of rights guaranteed by the Constitution.

Section 59.8(a)(1) of the new regulations, *see* 42 C.F.R. §§ 59.7-59.10 (1988), entitled in part "Prohibition on counseling and referral for abortion services," provides that a "Title X project may not provide counseling concerning the use of abor-

tion . . . or provide referral for abortion." There can be no doubt that the Secretary intends this regulation to forbid a grantee from informing a pregnant woman of the availability of abortion and even from telling her where she can get abortion-related information. For example, though the regulations permit a grantee to give the woman a list of prenatal-care service providers that might also offer abortions, the list must comply with several requirements. It *must* include any available prenatal-care providers that *do not* perform abortions; it *cannot* include providers that offer abortions as their "principal business"; and it cannot "weigh[ ]" in favor of abortion providers. 42 C.F.R. § 59.8(a)(3). The grantee is not allowed to inform the woman which providers on the list, in addition to offering prenatal care, also perform abortions. Rather, care providers that also perform abortions may be included only if "*the referral* is *specifically* made to the providers of *prenatal* care services." 53 Fed. Reg. 2922, 2938 (1988) (emphasis added). Indeed, the grantee is required to inform the client about care to preserve the unborn fetus. Section 59.8(a)(2), for example, provides that "once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services *by furnishing a list of available providers that promote the welfare of mother and unborn child.*" (Emphasis added.)

The majority states that the regulations "do not facially discriminate on the basis of viewpoint of the speech involved," that they do not authorize argumentation "pro or con" as to the advisability of abortion, and that they do not suggest "in any way" that Title X funds may be used for advocacy against abortion. I submit that precisely the opposite is plain from the face of the regulations. In addition to the regulations discussed above, for example, § 59.8(b)(4) provides that when a woman asks for a list of abortion providers, the grantee is not permitted to give her a list that includes entities whose principal business is abortion, or a list that does not include "providers of prenatal care in the area which *do not* provide or refer for abortions." (Emphasis added.) In contrast, § 59.8(b)(5) provides that when a woman asks for information on abortion, the grantee is permitted to "tell[ ] her that the project does not consider abortion

an appropriate method of family planning and therefore does not counsel or refer for abortion"; it is permitted to "tell[ ] the client that the project can help her to obtain prenatal care and necessary social services, and provide[ ] her with a list of such providers from which the client may choose."

Thus, the express prescriptions and proscriptions in the regulations require the grantee to emphasize prenatal care and prohibit it from identifying any entity as a provider of abortions. Plainly, the regulations facially discriminate on the basis of viewpoint and control the content of the grantee's permitted speech.

In *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), the Supreme Court warned that the government may not, consistent with First Amendment constraints, manipulate subsidy programs in a way " 'ai[med] at the suppression of . . . ideas' " it considers undesirable. *Id.* at 548 (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)). In my view, just such an impermissible manipulation has occurred here.

This content restriction is all the more pernicious because it deprives a woman of her constitutionally protected right, recognized in *Roe v. Wade*, 410 U.S. 113 (1973), to choose whether or not she will have an abortion. The regulations at issue here prohibit the physician in a Title X facility from communicating to his patient frank and complete advice if it involves consideration of abortion. They require him, in referring his patient to other health-care providers, to identify only prenatal-care facilities. If his pregnant patient raises the subject of abortion, he is required to tell her that he cannot give her any advice or counseling on the subject. If she asks where she can get information, the regulations prohibit even an informative response.

Though the majority seems to believe that it is sufficient that the grantee is allowed to keep the "yellow pages" in its offices, a telephone book seems a poor substitute for the advice of one's doctor. Further, the Secretary's interpretations of the regulations, both written and oral, reveal that the Title X grantee is not even allowed to refer the woman to the yellow pages. Thus, the written interpretation of the regulations says merely that the grantee may "keep[ ]" the yellow pages, while in the same sentence referring to *other* information that may be "provi[ded]."

53 Fed. Reg. 2922, 2942 (1988). There is no indication in the written interpretation that the yellow pages may be "provided," and at oral argument of this appeal, the Secretary stated that they could not.

By damming the flow of information from physician to patient, the Secretary's regulations impermissibly impede a woman's exercise of her constitutional privacy right. Time and again, the Supreme Court has emphasized that governmental regulation violates a woman's right to choose between childbirth and abortion when it interferes with the information and advice she may be given by her physician. In *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) ("*Akron*"), the Court stated that "a pregnant woman must be permitted, in consultation with her physician, to decide to have an abortion and to effectuate that decision 'free of interference by the State.' " *Id.* at 429-30 (quoting *Roe v. Wade*, 410 U.S. at 163). In *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) ("*Thornburgh*"), the Court disapproved a requirement that a physician provide a woman with a list of agencies offering alternatives to abortion, finding it to be "nothing less than an outright attempt to wedge the [state]'s message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician." *Id.* at 762.

Unlike the regulatory schemes in such cases as *Harris v. McRae*, 448 U.S. 297 (1980), and *Maher v. Roe*, 432 U.S. 464 (1977), in which the regulating authority was found merely to have refused to extend an affirmative benefit to women who freely chose abortion, but not to have placed obstacles in the way of an informed choice, the Secretary's regulations here plainly interfere with the pregnant woman's freedom to decide which course of action she prefers. In some cases, the information ban will delay the appropriate education of the patient to such an extent that she is denied any genuine choice. In some cases, the patient will never be fully informed, for as the Secretary has acknowledged, "[f]or many clients, family planning programs are their only continuing source of health information and medical care." U.S. Dep't of Health and Human Services, *Program Guidelines for Project Grants for Family*

Planning Services § 9.4 (1981). These regulations prevent such a program from giving the client any substantive information regarding abortion as an option; if she asks where she may obtain such information, her Title X physician is prohibited from telling her.

By prohibiting the delivery of abortion information and prohibiting communication even as to where such information can be obtained, the present regulations deny a woman her constitutionally protected right to choose. She cannot make an informed choice between two options when she cannot obtain information as to one of them.

In sum, I would rule that just as a "State may not require the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth,' " *Thornburgh*, 476 U.S. at 760 (quoting *Akron*, 462 U.S. at 444), the government may not forbid the delivery of certain information in order to promote an uninformed choice.

I would also rule that the new regulations on counseling and referral are arbitrary and capricious. Certainly the proscription of § 1008, *i.e.*, that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning," 42 U.S.C. § 300a-6, does not on its face require a ban on the communication of information or on grantees' directing a pregnant woman to a non-Title X entity from which she can obtain information and counseling on abortion. The Secretary's prior interpretation was that "the provision of information concerning abortion services [and] mere referral of an individual to another provider of services for an abortion . . . are not considered to be proscribed by § 1008."

Nor has practice suggested that the Secretary's about-face was needed for enforcement purposes. Regulations embodying the prior interpretation were in effect for some 17 years, and the Secretary cites no abuse of the prior regulatory scheme. Indeed, a 1982 report of the U.S. General Accounting Office, following review of grantee compliance with the strictures of Title X and the regulations thereunder, found "no evidence that title X funds had been used for abortions or to advise clients to have abortions," and "no indications that any women were . . . encouraged to have abortions." Rather, at oral argument of

this case in the district court, the Secretary admitted that his new regulations were the result of a shift in the political climate. Thus, he stated that

> it is certainly true that one of the prime reasons for these regs is a stricter enforcement of the separation of abortion as family planning from Title X programs. That is a matter of policy. It is a matter of politics.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 88-6204/06

THE STATE OF NEW YORK, THE CITY OF NEW YORK, THE NEW YORK CITY HEALTH & HOSPITALS CORP., DR. IRVING RUST, on behalf of himself, his patients, and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

Plaintiffs-Appellants,

—against—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Defendant-Appellee.

ORDER

Plaintiffs-appellants having come before this court on a Motion for an Injunction and Stay Pending Review on Writ of Certiorari pursuant to Fed. R. App. P. 41(b) and the arguments of both parties having been duly considered and upon good cause shown, it is on this 21st day of November, 1989,

ORDERED that defendant-appellee Sullivan, his successors and assigns, be enjoined from enforcing or relying upon the regulations codified at 42 C.F.R. §§ 59.2, 59.5, 59.7, 59.8, 59.9, 59.10 (1988) in any manner as to plaintiffs-appellants herein, pending review of this case by the United States Supreme Court on writ of certiorari; and it is

FURTHER ORDERED that the mandate of this court in *New York v. Sullivan*, Nos. 88-6204/06 (2d Cir. Nov. 1, 1989), be stayed pending final resolution of this case by the United States Supreme Court.

Dated: 11/21/89 Signed: /s/ AMALYA L. KEARSE
per RKW

/s/ RICHARD J. CARDAMONE
per RKW

/s/ RALPH WINTER

S. Rep. No. 1004, 91st Cong., 2d Sess., *reprinted in* 116 Cong. Rec. 24095-96 (1970)

. . . .

The committee does not view family planning as merely a euphemism for birth control. It is properly a part of comprehensive health care and should consist of much more than the dispensation of contraceptive devices . . . . [A] successful family planning program must contain the following components:

(1) Medical services, including consultation, examination, prescription, and continuing supervision, supplies, instruction, and referral to other medical services as needed.

. . . .

H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 5081-82

. . . .

. . . .

It is, and has been, the intent of both Houses that the funds authorized under this legislation be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities. The conferees have adopted the language contained in section 1008, which prohibits the use of such funds for abortion, in order to make clear this intent. The legislation does not and is not intended to interfere with or limit programs conducted in accordance with State or local laws and regulations which are supported by funds other than those authorized under this legislation.

. . . .

Public Health Service Act § 1001, 42 U.S.C.A. § 300 (West 1982)

Historical Note

. . . .

"It is the purpose of this Act . . . .

"(1) to assist in making comprehensive voluntary family planning services readily available to all persons desiring such services;

. . . .

"(4) to enable public and nonprofit private entities to plan and develop comprehensive programs of family planning services;

"(5) to develop and make readily available information (including educational materials) on family planning and population growth to all persons desiring such information;

. . . .

United States Department of Health and Human Services, *Program Guidelines For Project Grants For Family Planning Services* (1981)

. . . .

8.6 PREGNANCY DIAGNOSIS AND COUNSELING

Grantees must provide pregnancy diagnosis and counseling to all clients in need of this service. Pregnancy testing is one of the most frequent reasons for an initial visit to the family planning facility, particularly by adolescents. It is therefore important to use this occasion as an entry point for providing education and counseling about family planning.

. . . .

Pregnant women should be offered information and counseling regarding their pregnancies. Those requesting information on options for the management of an unintended pregnancy are to be given non-directive counseling on the following alternative courses of action, and referral upon request:

—Prenatal care and delivery
—Infant care, foster care, or adoption
—Pregnancy termination

. . . .

United States Department of Health, Education, and Welfare, *Program Guidelines For Project Grants For Family Planning Services* (Jan. 1976)

. . . .

Patients [who become pregnant with the IUD in place] should be advised as follows:

. . . .

(3) If the IUD is not removed, the patient should know there is an increased risk of infected abortion occurring when pregnancy is allowed to continue. The patient and her physician should discuss whether it is best to terminate or continue the pregnancy.

. . . .

The following should be covered during the interview [following the physical examination and the selection of a family planning method]:

. . . .

(h) Give pregnancy counseling, when appropriate.

. . . .

(j) Make appropriate referrals for any needed services not furnished through the facility. (Such referrals should be followed-up by the project.)

. . . .

***Amicus* Brief of the Secretary of Health and Human Services, *Valley Family Planning v. North Dakota*, 661 F.2d 99 (8th Cir. 1981) (No. 80-1471)**

Attachment A: Memorandum from Department of Health, Education, and Welfare (July 25, 1979)

. . . .

Hence, while § 59.5(d) does not require a project to make referrals to abortion providers in *all* cases, a project could not - consistent with § 59.5(d) - refuse as a matter of policy to make such referrals in *any* case, regardless of the medical indications therefor.

. . . [A] project *may*, consistent with § 1008, make "mere referrals" for abortion, as long as it does not then go on to promote or encourage use of the procedure for family planning purposes. We see no reason why requiring the making of such referrals under the limited circumstances described above should change this result. Indeed, we think that where such a referral is necessary because of medical indications, abortion is not being considered as a method of family planning at all, but rather as a medical treatment possibly required by the patient's condition. . . .

. . . .

Attachment B: Memorandum From Office of the General Counsel, Department of Health, Education and Welfare (Apr. 14, 1978)

. . . .

[T]he provision of information concerning abortion services, mere referral of an individual to another provider of services for an abortion, and the collection of statistical data and information regarding abortion are not considered to be proscribed by § 1008. [Footnotes omitted.]

. . . .

National Center for Family Planning Services, Health Services and Mental Health Administration, Department of Health, Education, and Welfare, *A Five-Year Plan for the Delivery of Family Planning Services* (Oct. 1971)

. . . .

Within the context of family planning service programs, abortions are not viewed as a method of fertility control, but as a service that should be available in accordance with local laws only in the event of a human or contraceptive method failure.

. . . Abortion would then serve as a backup measure for contraceptive failure, thereby still further assuring the freedom of choice of those who do not desire an unwanted birth.

. . . .

Memorandum from Joel M. Mangel, Deputy Assistant General Counsel, to Louis M. Hellman, M.D., Deputy Assistant Secretary for Population Affairs (Apr. 20, 1971) (re: § 1008 of the Public Health Service Act)

. . . .

We do not believe that the word "program," as used in section 1008, was intended to be so comprehensive as to include any and all family planning activities carried on by an applicant for Title X funds. For example, we do not believe that a hospital offering abortions for family planning purposes, consonant with State law, would be disqualified from receiving Title X funds for the operation of a separate family planning program which utilized only preventive family planning methods.

. . . .

Letter from Louis M. Hellman, M.D., Deputy Assistant Secretary for Population Affairs, to Hilary H. Connor, M.D., Regional Health Administrator (Nov. 19, 1976) (discussing current policies regarding use of Title V and Title X funds for counseling and payment of abortions)

. . . .

[I]f you are funded under Title X, you cannot promote or encourage abortion. In other words, you should not employ directive counseling in relation to abortions. A counselor working under the aegis of a physician, however, has not only a First Amendment right but duty to inform a patient of all legal options. The right to make referrals comes under the First and Fourteenth Amendments as well as the Code of Ethics of the American Medical Association.

. . . .

Memorandum from Louis Belmonte, Regional Program Consultant, Family Planning (May 25, 1979) (clarifying grantees' family planning program activities with respect to § 1008 of Title X)

. . . .

The provision of information on abortion services and the mere referral of a patient to another provider for such a procedure are permissible.

. . . .

DR. MELITA GESCHE

Director of the Bureau of Reproductive Health of the New York State Department of Health ("NYSDOH")
November 10, 1987

. . . .

4. The NYSDOH, through its Bureau of Reproductive Health, is one of two Title X grantees in New York State. The other is the Medical Health and Research Association of New York City, Inc. ("MHRA"). As a grantee, the NYSDOH administers the yearly Title X family planning services project grant it receives from the United States Department of Health and Human Services ("HHS"). . . .

5. . . . The NYSDOH Title X project grant funds 37 delegate agencies throughout New York State. . . .

6. Nearly 200,000 women were served by Title X subsidized family planning delegate agencies in 1986. . . .

. . . .

15. Further, the regulations would bar the Title X agency from providing the pregnant patient with complete and comprehensive information regarding the full range of options available to her. The Title X subsidized agency would not be able to

refer or counsel the patient regarding all her options nor provide the patient with descriptive information to aid her in making a decision. Instead of providing the patient with appropriate or necessary counseling, the Title X subsidized agency would be restricted to handing the patient a list of names weighted in favor of health care providers who provide prenatal care. This again patently violates all tenets of sound and ethical, medical practice, which, as codified in the State's public health law on informed consent, require health professionals to disclose to patients all risks, benefits and alternatives to a particular mode of treatment. Public Health Law § 2805-d.

. . . .

18. The separation requirements contained in 42 C.F.R. § 59.9 threaten the continued viability of many of the Title X subsidized agencies in New York because of the administrative costs, increased costs for property and property insurance, increased costs of personnel and the like. Most hard hit will be rural areas, in which the Title X subsidized clinics serve large areas and where duplication of services would be financially and administratively unfeasible. Consequently, the regulations jeopardize the availability of family planning services to women in New York State, particularly in its rural areas.

. . . .

21. Implementation of the regulations would further drain the limited resources of the state, which already largely fund the family planning programs in New York State. Because the regulations conflict with state law and with well settled standards of professional conduct[,] see paragraph 15, *ante*, agencies would be forced to choose between State and Title X funding. . . . Even if the state law provisions explained in paragraph 15 could be ignored and agencies could receive both federal and state funding, the regulations would still increase costs of the state. For example, the regulations' separation requirements would prove so financially and administratively burdensome for many Title X recipients that they may choose either not to comply with those requirements or to provide only restricted services under Title X. Either choice will impose a financial burden on

the state which may have to replace either the abandoned money or service.

. . . .

LINDA RANDOLPH, M.D., M.P.H.

Director of the Office of Public Health of the New York State Department of Health ("NYSDOH")
November 13, 1989

. . . .

3. Complying with the regulations would run counter to NYSDOH's standards of acceptable medical practice by effectively denying low- and moderate-income women information they need to make informed decisions about their reproductive health care. Carrying out the requirements of 42 CFR 59.8-59.10 would violate New York State's policy that medical service "of the highest quality, efficiently provided and properly utilized at a reasonable cost, are of vital concern to the public health." *See* N.Y.S. Public Health Law § 2800. Implementation of the regulations at issue would force medical professionals to violate state codes of professional conduct; *see* N.Y.S. Education Law §§ 6506-6509, 8 NYCRR 29.2; and render them liable for malpractice for failing to give full informed consent. *See* N.Y.S. Public Health Law § 2805-d(1).

. . . .

STEPHEN C. JOSEPH, M.D.

Commissioner of Health for the City of New York and a member of the Board of Directors of the New York City Health & Hospitals Corporation
March 4, 1988

. . . .

5. Title X clinics are sources of both health care services and information. In fact, they are the sole source of non-emergency health care for many low income women. . . .

. . . .

9. Under the new regulations, the Title X clinic can no longer explain to a patient that her medical condition (for example, AIDS) or some other factor (for example, exposure to rubella) may have seriously damaged her fetus. The clinic can only refer her to another provider, on the assumption and in the hope that the next provider will counsel her appropriately. In the meantime, the patient will remain ignorant of the information she needs—as soon as possible—to determine whether she wants to risk delivering a severely damaged baby. By the time she gets this information, it may be too late for a first trimester, or for any, abortion.

. . . .

GEORGE W. MORLEY, M.D.

President of the American College of Obstetricians and Gynecologists ("ACOG")
February 1, 1988

. . . .

6. Every year, some 3,900 Title X clinics provide family planning services to nearly 4.5 million patients, many of whom are low income women or adolescents with high risk pregnancies and few of the financial or personal resources necessary to obtain private medical care. . . .

. . . .

12. The prohibition on counseling and referral for abortion may . . . delay women in obtaining abortion services until later and more hazardous stages of pregnancy. Abortions performed later in pregnancy carry increased morbidity and mortality risks. Although only a small percentage of abortions are performed during the second trimester of pregnancy, these abortions caused approximately half of all abortion-related deaths between 1972 and 1981. Moreover, the mortality risk for abortion increases 50 percent with each week after the eighth week of pregnancy while the risk of major complications (morbidity) increases about 30 percent per week. Delay in obtaining abortion services is thus particularly harmful for pregnant adolescents, who already tend to seek medical services belatedly.

13. The requirement that pregnant patients be referred only to prenatal or delivery services will further delay women seeking abortions. Some of these women may be unable to locate a licensed provider in a timely fashion. . . .

14. The prohibition on counseling regarding abortion undermines the very informed consent process for which physicians are responsible. Patients will be deprived of information necessary to make family planning and other health care choices.

. . . .

18. The regulations also will irreparably harm Title X-funded health professionals by causing them to violate the standards of conduct and ethics promulgated by ACOG and other professional organizations. Restrictions on the content of physician-patient counseling are contrary to the ethical practice of medicine and violate a basic medical principle: the duty of the health care provider to supply all pertinent information to the patient.

19. . . . ACOG *Standards for Obstetric-Gynecologic Services* (1985) . . . state:

> In the event of an unwanted pregnancy, the physician should counsel the patient about her options of continuing the pregnancy to term and keeping the infant, continuing the pregnancy to term and offering the infant for legal adoption, or aborting the pregnancy

and ACOG *Statement of Policy* (Dec. 1977) . . . states:

> Counseling directed solely toward either promoting or preventing abortion does not sufficiently reflect the full nature of the problem or the range of options to which the patient is entitled. Appropriately balanced counseling, combined with the available and accessible facilities, provides the *minimum* base for the opportunity to make a truly informed choice. (Emphasis added).

. . . .

21. Restrictions on a physician's ability to provide information to patients also raises the spectre of medical malpractice. Physicians may be liable for failure to fully inform patients of all alternative options, failure to provide adequate information regarding health risks, and failure to provide appropriate follow-up services. . . .

. . . .

JAMES H. SAMMONS, M.D.

Physician and the Executive Vice President of the American Medical Association ("AMA")
February 18, 1989

. . . .

3. [T]he AMA believes that physicians must be free to disclose to their patients the full spectrum of information and options necessary for informed medical decision making. The "Principles of Medical Ethics" promulgated by the AMA, as

elaborated upon in the *Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association* (1986) specifically acknowledge that:

> The patient's right of self-decision can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. The patient should make his own determination on treatment. The physician's obligation is to present the medical facts accurately to the patient or to the individual responsible for his care and to make recommendations for management in accordance with good medical practice. The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice.

Opinion 8.07. Thus, every physician has an ethical and professional *duty* to provide a patient with enough information so that she can make an informed decision as to her medical care.

4. In the opinion of the AMA, the regulations at issue in this case will interfere with the ability of those physicians who happen to be in Title X-funded programs to exercise their best judgment in the manner most responsive to and appropriate for the individual patient's health needs. They will prevent a frank discussion of medical information and artificially constrict the physician-patient dialogue in ways that are inconsistent with sound medical care.

. . . .

8. . . . [T]he AMA is deeply concerned that these regulations will endanger the lives and health of women with medical conditions which may be exacerbated by pregnancy. Under the new regulations, a woman with a condition such as AIDS, diabetes, hypertension, heart disease, renal disease, sickle cell anemia, or cancer will be deprived of necessary counseling and information—*e.g.*, that she faces serious health risks as a result of her pregnancy. Professional standards of care require, however, that physicians be free to apprise these women of the seriousness of their condition, and the potential threat to their lives and health. . . .

. . . .

16. [T]he AMA is deeply concerned that the new regulations seek to legislate medical practice for physicians in Title X-funded programs irrespective of sound medical practice, the physician's best clinical judgment, and the patient's medical needs and wishes. These regulations will force physicians to give their patients medically incomplete and potentially misleading information and referrals. They will compel them to encourage childbirth for all pregnant patients without regard to their critical medical needs and without counseling or discussion about their individual situations. They will denigrate the integrity of the physician-patient relationship. They will force physicians to violate established standards of medical care and professional ethics, and often their own conscience.

. . . .

STANLEY K. HENSHAW, Ph.D.

Deputy Director of Research
for the Alan Guttmacher Institute ("AGI") in New York City
March 3, 1988

. . . .

3. In my expert opinion, this regulation will effectively exclude the abortion providers to whom most poor women turn and can afford. Abortions performed in hospitals are generally prohibitively expensive for poor women.

4. [T]he overwhelming majority of abortions are obtained from hospitals or from providers who must be excluded from the referral list. As stated in my earlier affidavit, 70% of all abortions in this country are performed at clinics which would likely have to be excluded from the referral list. In New York State, only 26.5% of the abortions obtained in 1985 were obtained from non-hospital providers who could appear on the required referral list.

5. In addition, because of the maldistribution of abortion providers in New York, any restriction on referrals to licensed abortion providers creates an obstacle to a woman's exercise of

choice. Out of the State's 62 counties, 16 have no providers of abortion that are documented; in 21 counties, the only available providers of abortion services are hospitals.

. . . .

ALLAN ROSENFIELD, M.D.

Professor of Obstetrics-Gynecology and Public Health
and Head of the Division of Population and Family Health
of the Columbia University School of Public Health
February 4, 1988

. . . .

22. . . . The[ ] effect [of the regulations] on the provision of family planning services is no different than a cancer treatment center which favors chemotherapy and radiation over surgery and which thus refuses to give affected individuals information about surgical treatment options and requires staff physicians to give *every* cancer patient counseling about the preferred treatment.

. . . .

JAY KATZ, M.D.

Faculty, Yale Law School
Expert on Informed Consent
March, 1988

. . . .

6. . . . [T]hese regulations do violence to the most basic principles governing the doctor-patient relationship. They compel a doctor to deceive his patient by keeping available options from her and by preventing her from seeking medical services which heretofore have been her right. . . . When a physician conceals options from a patient he abandons her to irreversible

life consequences which she might not have chosen. Abandonment is one of the most heinous violations of the law of malpractice and of medical ethics.

7. The doctor-patient relationship is based on trust. *See* P. Parsons, *The Social System*, (1951); it is recognized by law as a fiduciary relationship. Because patients must be able to rely on their physicians to act in good faith and in their best interest, principles of law and ethics require them to do so.

8. The physician . . . has an obligation to be truthful, to respect the rights of the patient, and to disclose to the patient all pertinent facts regarding the patient's condition and treatment options including the risks and benefits of each. *See Natanson v. Kline*, 350 P.2d 1093, 1102-03 (Kan. 1960).

. . . .

10. . . . [A]lthough a Title X physician may not actually provide abortion or long-term prenatal services, the physician remains obligated to provide the patient with sufficient information to permit a patient to obtain timely, appropriate services elsewhere.

11. In 1978, the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research (the "Commission") was established by statute and charged with the task of examining the ethical and legal aspects of informed consent in the doctor-patient relationship. *See* 42 U.S.C. § 300v *et seq*. The Commission's report, *Making Health Care Decisions: A Report on the Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship*, . . . was released in 1982. . . . The Commission concluded that "a physician is obliged to mention all alternative treatments, *including those he or she does not provide or favor*, so long as they are supported by respectable medical opinion." *Id.* at 76 (emphasis added).

. . . .

RAYMOND FINK

Chairperson of the Medical and Health Research Association of New York City, Inc. ("MHRA")
November 9, 1989

. . . .

7. Title X funds allocated to MHRA/MIC-FPP are used to support the provision of family planning services at its Tremont Clinic in the Bronx. During 1988, the Tremont Clinic alone provided over 3,800 visits with Title X dollars. The vast majority of the patients are Black or Hispanic; over 90% have incomes below 150% of the federal poverty level; and 60% are adolescents.

. . . .

10. . . . No other providers in the community are currently in a position to offer comparable services. . . . Because family planning clinics are the only source of health care for many low-income women, many of the patients previously served would never reenter the health care system.

. . . .

13. . . . MHRA simply cannot afford, within the limits of its budget, the duplicative administrative, supervisory, and overhead costs that would be required to permit counseling about abortion with non-Title X funds to continue at a location physically separate from the Title X project site. Because MHRA would be unable to comply with the separation requirement, it is faced with an untenable choice: to forego Title X funds which subsidize the care provided to thousands of low-income women or to cease providing necessary information to patients subsidized by non-Title X sources. . . .

. . . .

JOAN COOMBS

Executive Vice President of Planned Parenthood of New York City, Inc. ("PPNYC")
November 10, 1989

. . . .

11. The HUB [Planned Parenthood's center in the South Bronx] provided family planning services for 6,274 low-income women and teenagers in 1988. Of these, 2,317 were under 20 years of age. . . . The HUB is a trusted community resource, not only for health services but for educational programs and teen pregnancy programs as well. Even if there were other services to which these families, women, and teens could turn, there is no doubt that many would be lost in the transition. And, in the South Bronx, adequate alternatives simply do not exist.

. . . .

TONI MORGAN, M.S.W.

Director of Social Services for the Bronx clinic (colloquially called the "HUB") of Planned Parenthood of New York City
December 22, 1987

. . . .

6. Adolescents frequently rely on clinic staff as the *only* available source of family planning information. . . .

. . . .

8. Timely, non-directive counseling which addresses the *whole* adolescent is a necessary part of any family planning program. In fact, when an adolescent is in need of counseling and this need is not met promptly, the consequences may be as serious as repeated pregnancies, running away from home, failure in school or even suicide. Referral alone will often result in severe harm to the adolescent who, having timidly and tentatively reached out for help in a crisis, must be rejected and told to go elsewhere. Faced with such a referral, many of my clients would never obtain help; others would act out in destructive and frequently irrevocable ways.

. . . .

STEPHEN WHITE

Director of Planned Parenthood of Dutchess-Ulster ("PPDU")
December 16, 1987

. . . .

13. The regulations require us to promote childbearing and make the subject of abortion off-limits, irrespective of the patient's emotional or medical condition. Without information, many women will be unaware of their choices. Many women don't know that abortion is a safe and legal alternative to an unintended or unwanted pregnancy. Many won't know that obtaining an abortion after the first trimester is associated with greater health risks. Others won't know of the risks to their health if they continue their pregnancies. And others will travel to distant abortion providers instead of providers nearer to PPDU.

. . . .

15. . . . Many patients will therefore have no source of medical care and conditions we detect will remain untreated. In addition, many patients, particularly teens have no other source of confidential and responsible information.

. . . .

HIROKO T. FELTON, M.D.

Director of the Family Planning Project at Harlem Hospital in New York City
December 29, 1987

. . . .

13. It would be extremely difficult for Harlem [Hospital] to comply with the new Title X regulations and still provide quality medical services in accordance with community standards and New York State law. The new regulations would irreparably harm our program and our patients in the following ways:

a. Options counseling would be curtailed, since any responsible testing and options counseling session must include a discussion of abortion, particularly for patients who express the desire to terminate pregnancy. Patients for whom abortion is medically necessary could, if denied information on the option of abortion, suffer irreparable physical and mental harm.

b. . . . When a counselor is prohibited from answering pregnant and non-pregnant patients' legitimate questions about abortion, the relationship between the two may be irreparably damaged, and the patient may seek answers from less reliable sources.

. . . .

d. The ability of Harlem to hire and retain the necessary doctors and other health professionals would be seriously threatened, because compliance with the regulations would mean asking them to breach professional ethics (which require that full and correct information be given to patients).

e. Harlem has one of the few licensed abortion facilities that provides services to uninsured patients regardless of ability to pay. Pregnant patients who are not informed that abortion is an available option could be at increased

medical risk through delay in finding a facility that provides low-cost or Medicaid-reimbursable abortions.

. . . .

ROBERT L. COHEN, M.D.

Vice President, Medical Operations of the New York City Health and Hospitals Corporation
March 3, 1988

. . . .

3. Appropriate medical care requires that a physician present sufficient information for the patient to make an informed, intelligent decision about her course of action and the care she desires. Logically, a pregnant patient needs this information *before* she chooses the provider of that care from the clinic's referral list. This is especially true because the patient's decision about pregnancy is one in which time is genuinely of the essence. The physician's failure to provide vital information, on the assumption that such information may be available to the patient later, is medically irresponsible. The health risks to both mother and fetus increase dramatically with every week of delay.

. . . .

PAUL DRISGULA

Director of Planned Parenthood of Schenectady and Affiliated Counties ("PPSAC")
December 14, 1987

. . . .

18. . . . PPSAC serves a clientele comprised mainly of low-income people who have no other family planning providers or other medical providers to which to turn.

. . . .

22. We will be barred from providing our descriptive and comprehensive fact sheets and referral sheets. Without this information, many of our patients will travel needlessly long distances to obtain services or will contact providers who do not accept Medicaid. As a result, many of our patients may delay or encounter delays in obtaining abortions. Given that health risks increase if a patient receives an abortion after her first trimester, these delays may needlessly result in the health risks to our patients.

. . . .

24. Tragically, in 1986, 15 of our patients became pregnant as a result of rape. The regulations would prohibit us from advising these women of the availability of abortions. . . .

. . . .

27. Separating the abortion services from the Title X funded services as required under the regulations would be prohibitively costly. Acquiring a facility and renovating it to make it acceptable for our needs and compliant with State and local codes would be an extremely expensive proposition. In 1979, we renovated an unused part of our existing building for surgical use. That renovation alone cost $82,000. Even assuming we could use some of our equipment in a new site, we would need to acquire a building which would probably cost between $75,000 and $100,000 for the building and additional costs for ample parking space. It would be unfeasible for PPSAC to shoulder these costs, together with the costs for inventory, equipment, furniture and duplication of staff with our full range of benefits.

. . . .

KATE D. POTTEIGER

Director of Planned Parenthood of Tompkins County (Ithaca) ("PPTC")
December 15, 1987

. . . .

16. PPTC provides services to a population unserved or underserved by other medical providers. . . .

17. Absent comprehensive counseling and discussion regarding all the options available, including abortion, many of our patients will be unable to make an informed choice as to how to manage their pregnancy. Some will not know that abortion is a legal and safe alternative to unwanted or unintended childbearing. Many will not know that increased health risks are associated with abortions obtained after the first trimester. As a result, many of our patients could encounter needless health risks as a result of delaying in obtaining their abortions.

18. The regulations prohibit us from advising women with risky pregnancies of the harm continuing their pregnancies may pose to themselves or the child. The regulations would require us to counsel the woman pregnant as a result of a rape the same as we would counsel a healthy pregnant woman. Similarly, we would be required to counsel the pregnant 14 year old the same as a woman with an intended pregnancy—promoting childbirth and providing information regarding prenatal care until the time of the referral appointment.

. . . .

IRVING RUST, M.D.

Medical Director of the Bronx Center of Planned Parenthood of New York City, Inc. ("PPNYC")
February 5, 1988

. . . .

11. Lack of access to licensed medical facilities has been shown not to deter most patients from seeking an abortion. My inability to refer patients to licensed abortion providers would, accordingly, result in an increase in the number of self-abortions and abortions performed under hazardous medical conditions by persons lacking appropriate training rather than an increase in the number of patients carrying to term.

. . . .

15. The need for the dissemination of abortion information in the South Bronx community is illustrated by one of my patients who tried to abort herself by taking Humphrey's II, an over-the-counter drug which has been reputed to cause early abortion by inducing bleeding. While the drug itself is not dangerous, it will induce bleeding and may cause a partial abortion in a pregnant patient, which can seriously endanger her reproductive health. After treating the patient, I asked her why she had endangered her health when she could have obtained a safe and legal abortion. She responded that she didn't know that she could obtain an abortion, or where information about abortions was available. This incident points out the continuing need to disseminate information about the availability of abortion to the Bronx Center's community.

. . . .

17. There are distinct and additional harms to the lives and health of my patients for whom an abortion is medically indicated.

a. . . . One in 43 babies tested for AIDS in the Bronx are found to carry the AIDS virus. This is the highest figure of AIDS births in New York State. A pregnant patient

with AIDS must be told of the risks to her health and to the health of her child. She should also be told about the abortion option. Some of my patients have sickle cell disease; these women have a 25% chance of going into sickle cell crisis and dying as a result of pregnancy. . . . If a diabetic patient whose blood sugar fluctuates greatly is diagnosed as pregnant, I must inform that patient of the possibility that she may go into diabetic coma or insulin coma, as a result of the additional stress the fetus places on her system. I am also obliged to tell that patient that the fetus may die at any point in the pregnancy. Because such conditions do not clearly constitute "emergencies" under the proposed regulations, I could not provide such essential counseling but instead would be required to give the patients information on prenatal care, thus steering these women toward the serious health risk of carrying to term.

. . . .

MICHAELE P. WHITE

Administrator of Health Resources of The DOOR
December 15, 1987

. . . .

4. . . . Many of these young patients have no other place to which they can turn for information and support regarding their family planning and other health care needs. . . .

. . . .

6. We have observed over the years that many young people lack the motivation and/or ability required to be effective health consumers. They tend to require extensive follow-up to ensure compliance with even the simplest prescribed treatment regimes. In the case of complex treatments for which we lack the appropriate facilities, we must refer young people to other

providers, generally hospitals. Even when a referral is made to a particular clinic at a specified hospital (e.g., for a sonogram at X Hospital), many young people encounter obstacles to treatment at such institutions and seek our assistance. Any inhibition of our ability to assist young people in this situation could have negative consequences for the health of the young person.

. . . .

LORRAINE TIEZZI

Director of Family Planning Clinics at
The Presbyterian Hospital in the City of New York
February 4, 1988

. . . .

8. . . .

a. There is no other facility in the Washington Heights area which provides these kinds of family planning services and counseling, and the patients the Hospital serves are unlikely to go elsewhere in New York City to obtain family planning services. Thus, the curtailment of options counseling, which is compelled by the new regulations, would irreparably harm the patients the Hospital serves because they would get inadequate and incomplete counseling to make reasoned and informed judgments about whether to continue or terminate their pregnancies. . . . Patients for whom abortion is medically necessary could suffer irreparable physic[al] or mental harm, or in extreme cases, death, if they were not informed of the abortion option. . . .

. . . .

e. Presbyterian Hospital may have to redesign or relocate its family planning clinics, because of the requirement that personnel, equipment, and physical location of abortion services be physically separated from the Title X-funded family planning services. Such separation would not likely be financially or practically feasible for the Hospital.

f. When a counselor is prohibited from answering questions by pregnant and non-pregnant women about abortion, the relationship of trust and confidence that has been built up may be irreparably damaged . . . .

. . . .

ROBERTA MERRENS

Executive Director of Northern Adirondack
Planned Parenthood ("NAPP")
December 22, 1987

. . . .

5. 76% of our patients receive subsidized services at our clinic—services which are either free of charge or on a sliding scale basis. No other provider of family planning services in this area provides these services at no cost or on a sliding scale basis. The nearest providers of subsidized family planning services who would serve this population are one and a half hours away by ferry in Vermont or one and a half to two and a half hours away by car on roads covered by snow 6-8 months of the year. For many of our patients, a visit to NAPP is their first entry into the health care system; indeed, for some, it is their only source of regular health care.

. . . .

15. Without the benefit of discussion, many of our patients—particularly our teens and adolescents—will be unaware of the choices available to them. I cannot overemphasize that many women we serve do not know that abortion is a safe and legal option to unwanted childbearing.

. . . .

PAMELA ROE

December 23, 1987

1. I am a United States citizen and I reside in the Bronx. I am an 18 year old senior at John F. Kennedy high school in the Bronx.

2. I first heard about the Bronx Center several weeks ago from my boyfriend, after I told him that I might be pregnant. He knew about the Bronx Center because two of his sisters had used it.

3. I told my boyfriend that I wanted an abortion. I want to go to college and work in a bank one day. If I had a baby now it would be very tough for me. I wouldn't want to burden my mother or family with a baby. I would want my baby to be my responsibility, but I know that I couldn't handle being a mother right now. I would hate to have a baby and end up abusing it because I couldn't handle the pressure of being a mother. When my boyfriend told me about the Bronx Center, I was sure that I wanted an abortion.

. . . .

5. I have no private doctor or other source of health care. I thank God for the fact that I could get good service here at the Bronx Center.

. . . .

7. I know of no [o]ther places in the neighborhood like the Bronx Center.

8. Today I am here for my follow-up visit after abortion. They gave m[e] contraceptives. I wasn't using any form of birth control before I became pregnant.

9. I don't know what I would've done if the Bronx Center were not here. . . .

. . . .

LISA ROE

December 23, 1987

1. I am a United States citizen and I live in the Bronx. Lisa Roe is not my real name. It is a pseudonym I am using to protect my privacy.

2. I am a 17 year old senior at Morris High School in the Bronx.

3. I have been using the Bronx Center since March 1987. I first came here because I was pregnant and I wanted to have an abortion. I had an abortion at the Bronx Center in March. Now I use the family planning clinic. I did not use birth control before I became pregnant. Since my abortion I have used birth control pills provided by the Bronx Center.

4. I am on Medicaid. I have no private doctor or other source of health care.

5. If I didn't have the abortion in March, I might not have been able to finish high school and go on to college. Now I'm planning on starting at LaGuardia Community College in September.

. . . .

7. I would be disappointed if the Bronx Center had to close or couldn't do the good things it can do now, because I'd have no where else to go. I don't know of any other place for birth control or for abortions. I don't know what I would do if the Bronx Center wasn't here.

. . . .

Transcript of Oral Argument at 52 (Feb. 19, 1988) (statement of Robert J. Cynkar, U.S. Department of Justice), *New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988) (Nos. 88-0701, 0702)

. . . .

Your Honor, I think before I get into the law, . . . I would like to address the question of why the change, because I think the "why" is a bit relevant to the law here. And I'm not suggesting that all the medical ethics and whether this is sound policy is relevant to this court. But it is certainly true that one of the prime reasons for these regs is a stricter enforcement of the separation of abortion as family planning from Title X programs. That is a matter of policy. It is a matter of politics.

. . . .

ADDITIONAL MATERIALS

Letter from Representative Christopher H. Smith, *et al.*, to Donald T. Regan (Aug. 1, 1986)

The Honorable Donald T. Regan
Chief of Staff
White House
Washington, DC 20500

Dear Don:

On January 23, we met with you to discuss right-to-life concerns. One of the requests we made was for a change in Health and Human Services regulations, such that organizations which counsel women to give birth rather than to have abortions could qualify for grants under the Title X family planning program.

Under present HHS regulations, no organization that refuses to counsel or refer for abortion can qualify for a grant. This is clearly a violation of the intent of the law.

Don, over the last few years, thousands of pro-life counseling centers have been established around the country to provide

women an alternative to the centers that push abortion. As of today, none of these alternative centers can qualify for a grant, while those which counsel abortion can. Clearly, a change in HHS regulations is in order. We respectfully submit that such a change is overdue, six years into the Reagan Administration.

Inasmuch as no action appears to have been taken at HHS following our January 23 meeting at the White House, once again, we urge the Administration to require HHS to change the Title X regulations.

With warmest regards, we are

Sincerely yours,

/s/ Chris
Rep. Christopher H. Smith

/s/ Gordon
Sen. Gordon J. Humphrey

/s/ Henry
Rep. Henry J. Hyde

/s/ Jack
Rep. Jack F. Kemp

/s/ Vin
Rep. Vin Weber

***Excerpt from* Letter from Otis R. Bowen, M.D., to Representative Vin Weber (Aug. 19, 1986)**

The Honorable Vin Weber
House of Representatives
Washington, D.C. 20515

Dear Mr. Weber:

Mr. Donald Regan asked that I respond to your letter of August 1, recommending a change in the policy which required Title X Family Planning grantees to counsel and refer for abortion under certain circumstances. The change you suggest can be effected by amending the Title X program guidelines: a change in regulations is not necessary.

Much of the work on this guideline change has already been done in the Public Health Service, and I have directed that com-

pleting this effort be given the highest priority. I am confident that the guideline revision can receive the necessary reviews and clearances and be in effect in 30 days.

. . . .

Sincerely,

/s/ OTIS R. BOWEN, M.D.
Otis R. Bowen, M.D.
Secretary

Supreme Court, U.S.
FILED
MAY 7 1990
JOSEPH F. SPANIOL JR
CLERK

(5) (4)

Nos. 89-1391 and 89-1392

In the Supreme Court of the United States

OCTOBER TERM, 1989

DR. IRVING RUST, ET AL., PETITIONERS

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

THE STATE OF NEW YORK, ET AL., PETITIONERS

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
MICHAEL JAY SINGER
ALFRED MOLLIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOEL MANGEL
Deputy Chief Counsel
Public Health Service

CAROL CONRAD
Attorney
Office of the General Counsel
Department of Health and Human Services
Rockville, MD 20857

QUESTION PRESENTED

Title X of the Public Health Services Act, which authorizes federal grants to support the provision of family planning services, provides that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. 300a-6. The implementing regulations prohibit Title X grant recipients from providing, within their Title X programs, abortions or abortion-related services, including counseling clients about abortion, referring them to facilities that provide abortions, or engaging in abortion-related advocacy. The question presented is whether those regulations violate Title X, the First Amendment rights of grantees and pregnant women, or the Fifth Amendment rights of pregnant women to terminate their pregnancy.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1391

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THE STATE OF NEW YORK, ET AL., PETITIONERS

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (89-1391 Pet. App. 35a-67a)[1] is reported at 889 F.2d 401. The opinion of the district court (Pet. App. 9a-32a) is reported at 690 F. Supp. 1261.

[1] Hereinafter "Pet. App." will refer to the petition appendix in No. 89-1391, which applies to both cases.

JURISDICTION

The judgment of the court of appeals (Pet. App. 68a-69a) was entered on November 1, 1989. On January 11, 1990, Justice Marshall extended the time to file a petition for certiorari to and including March 1, 1990, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title X of the Public Health Services Act[2] authorizes the Secretary of Health and Human Services to make grants nationwide to public and private nonprofit entities to establish "projects"[3] that "shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents)." 42 U.S.C. 300. Congress provided, however, that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. 300a-6. That restriction was intended to ensure that Title X funds would "be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities." H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. 8 (1970).

[2] Title X was added to the Public Health Services Act by the Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1504, 42 U.S.C. 300 to 300a-8 (1982 & Supp. V 1987).

[3] "Title X project" and "Title X program" are used by the Secretary interchangeably, and can mean either the "program which is approved by the Secretary for support" or the "coherent assembly of plans, activities and supporting resources contained within an administrative framework." 42 C.F.R. 59.2. Moreover, while Title X services may be delivered through a family planning clinic, the Title X project may be only one aspect of that clinic.

2. The initial implementing regulations required that grantees "not provide abortions as a method of family planning" in Title X programs. 42 C.F.R. 59.5(9) (1972); see 38 Fed. Reg. 18,465 (1973); 45 Fed. Reg. 37,436 (1980). The statute was interpreted, however, to allow grantees to provide "non-directive counseling" about pregnancy termination, including information about and referral for abortions through the provision of the names, addresses, and telephone numbers of abortion providers. Pet. App. 42a-43a.

In 1988, in order to bring the Title X program more in line with the text and purposes of 42 U.S.C. 300a-6, the Secretary adopted new regulations that altered the counseling and referral policy; the regulations also clarified preexisting limitations on abortion-related advocacy and requirements of physical and financial separation from the performance of abortion-related activities. See 53 Fed. Reg. 2922, 2923-2925 (1988). The new regulations, as the court below observed, prohibit Title X grantees from engaging in "those activities that 'assist' a woman to obtain an abortion, while not interfering with the right to receive information about abortion from sources other than Title X projects." Pet. App. 43a. More specifically, the regulations attach three major conditions to the grant of federal funds for Title X projects.

First, a "Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." 42 C.F.R. 59.8(a)(1). Title X projects may not counsel their clients about abortion as a family planning method whether such counseling is neutral, favors, or opposes abortion. Nor may a Title X project assist women in procuring an abortion for family planning purposes by providing them with referrals to entities that provide abortions or abortion-related services as their principal business. 42 C.F.R. 59.8(a)(2). At the same time, the regulations do not forbid

a Title X project from making clear to its clients that the project only provides preventive family planning services and does not assist in procuring abortions and abortion-related services.

Second, the so-called "program-integrity" regulations clarify the required degree of physical and financial separation between Title X projects and the other parts of a grantee's organization that might provide abortion services. The regulations call for a case-by-case determination of "objective integrity and independence" based upon (but not limited to) factors such as (a) the existence of separate accounting records; (b) the degree of separation from facilities (*e.g.*, treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities; (c) the existence of separate personnel; (d) the extent to which signs and other forms of identification of the Title X project are present and signs and material promoting abortion are absent. 42 C.F.R. 59.9. See Pet. App. 45a. There are no other restrictions in that Section on the relationship between a grantee's Title X project and its other activities, or on the activities of parent or affiliate organizations.

Third, the regulations codify and clarify the preexisting prohibition on abortion advocacy, and give examples of activities so proscribed, such as lobbying and using legal action to make abortion available as a method of family planning. Pet. App. 45a-46a.[4]

[4] (1) Lobbying for the passage of legislation to increase in any way the availability of abortions as a method of family planning;

(2) Providing speakers to promote the use of abortion as a method of family planning;

(3) Paying dues to any group that as a significant part of its activities advocates abortion as a method of family planning;

(4) Using legal action to make abortion available in any way as a method of family planning; and

The regulations' restrictions concern only abortion as a method of family planning. The regulations require a Title X project to refer a client for necessary treatment in a medical emergency, even when this treatment would normally involve an abortion. See 42 C.F.R. 59.8(a)(2) and (b)(2). But the principal focus of Title X's subsidies is "[f]amily planning," which is defined as "the process of establishing objectives for the number and spacing of one's children and selecting the means by which those objectives may be achieved." 42 C.F.R. 59.2. Thus, the medical services that Title X supports also do not include post-pregnancy services, such as prenatal and obstetric care. Accordingly, if a client of a Title X project is diagnosed as pregnant and no medical emergency is present, she must be referred to an entity that will offer prenatal pregnancy care.[5] The regulations do not attempt to constrict the information that a Title X client might receive at a prenatal care facility; the fact that a pregnant woman received counseling about abortion as a method of family planning at the prenatal care facility would not, in itself, violate the regulations. But a Title X project may not employ prenatal care referrals as a means of circumventing Title X's restriction by "weighing the list of referrals in favor of health care providers which perform abortions, by including on the list * * * health care providers whose principal business is the provision of abortions, * * * or by 'steering' clients to providers who offer abortion as a method of family planning." 42 C.F.R. 59.8(a)(3).

(5) Developing or disseminating in any way materials (including printed matter and audiovisual materials) advocating abortion as a method of family planning.

42 C.F.R. 59.10(a).

[5] The client must "be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept." 42 C.F.R. 59.8(a)(2).

Moreover, the new regulations apply only "to the use of Title X project funds." 42 C.F.R. 59.10(a).[6] Any abortion-related services provided or activity engaged in by a grantee or its affiliates outside of its Title X project has no effect on the grantee's Title X funding.

3. After the regulations had been promulgated, but before they had been applied, these consolidated actions were brought, challenging the facial validity of the regulations on statutory and constitutional grounds. The district court upheld the regulations against both statutory and constitutional challenges, Pet. App. 9a-32a, and the court of appeals affirmed by a divided vote, *id.* at 35a-67a.

The court of appeals rejected as "highly strained" petitioners' argument that Title X forbids only the provision of abortions by Title X projects. Pet. App. 47a. The court found that the new regulations were based on a natural construction of the statute, *ibid.*, and were "fully consistent with" both "the language and history of Title X," Pet. App. 51a. The court also held that the regulations do not "impermissibly burden a woman's privacy right to an abortion" under *Roe* v. *Wade*, 410 U.S. 113 (1973). Pet. App. 53a. The court determined that the regulations do not place any "affirmative legal obstacle" in the path of a woman who might seek an abortion, and that therefore petitioners' claims

[6] Title X project funds are defined to include "grant funds, grant-related income or matching funds." Grant funds are those provided by the government; matching funds are the funds that must be supplied to the project by the grantee to cover the balance of expenses. Grant-related funds are funds generated by the Title X project through, for example, patient charges or reimbursement from collateral sources. The terms of the grant specify how grant-generated income may be used. The Secretary may allow these funds to be applied toward the 10% matching fund requirement; to be, in effect, returned to the government; or to be used to expand the Title X project. See, *e.g.*, 45 C.F.R. 74.42(c)-(e).

are "clearly refute[d]" by *Webster* v. *Reproductive Health Services*, 109 S. Ct. 3040 (1989). Pet. App. 55a.

The court also ruled that the limitations on the use of project funds for abortion counseling, referral, or advocacy do not violate the First Amendment. The court noted that, under *Regan* v. *Taxation with Representation*, 461 U.S. 540 (1983), the government has no obligation to subsidize even the "exercise of fundamental rights," including "speech rights." Pet. App. 56a. In addition, the court of appeals reasoned that the regulations do not "condition receipt of a benefit on the relinquishment of constitutional rights," since grantees and their employees "remain free to say whatever they wish about abortion outside the Title X project." *Id.* at 57a. Finally, the court held that the regulations "do not facially discriminate on the basis of the viewpoint of the speech involved." *Id.* at 59a. "Argumentation pro or con as to the advisability of an abortion for a particular woman is neither required nor authorized. * * * Nor do the regulations in any way suggest that Title X funds may be used for public anti-abortion advocacy." *Ibid.*[7]

ARGUMENT

Although we believe that the Second Circuit's decision is correct, we agree with petitioners that review by this Court is warranted. The decision in this case conflicts in several respects with the First Circuit's recent decision in *Massachusetts* v. *Secretary of HHS*, No. 88-1279 (Mar. 19, 1990) (en banc), *reprinted at* Pet. Supp. App. 1sa-49sa; the

[7] Judge Kearse dissented in part. She concluded that the new abortion counseling and referral regulations were arbitrary and capricious, and also violated the First and Fifth Amendments. Pet. App. 62a-67a. She did not conclude that the other portions of the regulations were invalid.

Solicitor General has authorized the filing of a petition for a writ of certiorari seeking review of the judgment of the First Circuit in that case.[8] The Second Circuit upheld the regulations in their entirety, rejecting petitioners' arguments that the regulations exceed the Secretary's authority under Title X and that the regulations violate the First and Fifth Amendments. Similarly, the First Circuit ruled that the regulations do not exceed the Secretary's authority under Title X, with the exception of the so-called "program integrity" regulations, which the First Circuit held invalid under the statute. But the First Circuit went on to hold that the regulations as a whole violate the First and Fifth Amendments.[9]

Accordingly, in view of the plain conflict among the circuits and the importance of the questions presented, we believe that review by this Court is appropriate.

---

[8] The questions at issue in this case are also pending before the Tenth Circuit on appeal from a district court decision invalidating the Secretary's regulations on statutory and constitutional grounds. *Planned Parenthood Fed'n* v. *Bowen*, 680 F. Supp. 1465 (D. Colo. 1988), appeal pending, No. 88-2251 (10th Cir.). The regulations were upheld in part and invalidated in part on constitutional grounds in *West Virginia Ass'n of Community Health Centers, Inc.* v. *Sullivan*, CA No. 2:89-0330 (D. W. Va. Mar. 1, 1990), appeal pending, No. 90-2366 (4th Cir.).

[9] The First Circuit further held that the invalid portions of the regulations were not severable from the valid portions. Pet. Supp. App. 42sa-44sa. The Second Circuit had no occasion to consider that issue, given its ruling upholding the regulations.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
MICHAEL JAY SINGER
ALFRED MOLLIN
Attorneys

JOEL MANGEL
Deputy Chief Counsel
Public Health Service
CAROL CONRAD
Attorney
Office of the General Counsel
Department of Health and Human Services

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No. 89-1391

Supreme Court, U.S.
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IN THE

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OCTOBER TERM, 1989

DR. IRVING RUST, on behalf of himself, his patients, and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RACHAEL PINE
(*Counsel of Record*)
JANET BENSHOOF
LYNN PALTROW
KATHRYN KOLBERT
LOUISE MELLING
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800 ext. 520

NORMAN SIEGEL
ARTHUR EISENBERG
New York Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 382-0557

Of Counsel:

LAURIE ROCKETT
Hollyer, Jones, Brady, Smith, Troxell, Barrett & Chira
342 Madison Avenue
New York, New York 10173
(212) 818-1110

BEST AVAILABLE COPY

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—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Pursuant to Supreme Court Rule 15.7, petitioners herein respectfully submit this supplement to their petition for a writ of certiorari. This supplement is submitted for the purpose of bringing to the attention of this Court the recent decision of the First Circuit Court of Appeals in *Massachusetts v. Secretary of Health and Human Services*, No. 88-1279 (1st Cir.

Mar. 19, 1990) (*en banc*) (1-49sa).[1] Because the petition for a writ of certiorari was filed on March 1, 1990, *Massachusetts v. Secretary of Health and Human Services* constitutes a "new case[ ]" within the meaning of Rule 15.7.

Massachusetts v. Secretary of Health and Human Services involves a challenge to the legality of the same federal regulations at issue herein. *See* Amendments of Regulations Governing Grants for Family Planning Services, 53 Fed. Reg. 2944-46 (1988) (codified at 42 C.F.R. §§ 59.2, 59.5, 59.7, 59.8, 59.9, 59.10) (1-8a).[2] As in the instant case, the regulations were challenged on both statutory and constitutional grounds. In contrast to the holding of the court of appeals below (35-67a), however, the First Circuit invalidated the regulations and affirmed the district court therein. (1-49sa).[3] The conclusions of First Circuit thus bear directly on petitioners' argument that the Second Circuit's decision conflicts with decisions of other circuits, *see* Point IV of the petition, and that certiorari in the instant case should therefore be granted.

The First Circuit's conclusions conflict with those of the Second Circuit in the following essential respects. First, the

1 The opinion of the First Circuit is reprinted in the Appendix to this Supplement, which follows the argument. Citations to this Appendix are made to the page number therein as "(_____sa)."

2 References to the amended regulations and other materials in the Appendix to Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit filed on March 1, 1990 are made to the page number therein as "(_____a)."

3 Petitioners herein are not protected by the injunction issued by the district court in *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988), *aff'd*, *Massachusetts v. Secretary of Health and Human Services*, No. 88-1279 (1st Cir. Mar. 19, 1990). *See* Declaration of Rachael Pine at ¶ 4 (Nov. 13, 1989) (citing attached Letter from Eileen Connolly, Chief of Family and Child Services Branch, HHS, to Family Planning Project Directors (Nov. 3, 1988) and *Massachusetts v. Bowen*, Clarification at 2 (Mar. 21, 1988)) (filed with the Second Circuit in support of Motion for Injunction and Stay Pending Review in the Supreme Court). Thus, petitioners will be without injunctive relief from the challenged regulations if and when their petition for a writ of certiorari is denied.

First Circuit found that § 59.9 of the challenged regulations, which requires that the Title X program be physically and financially separate from abortion counseling, referral, or advocacy, "exceeds the Secretary's authority." (12sa). The court found § 59.9 "completely contrary to the express Congressional intention to expand family planning services," because it will have the effect of limiting those programs. (12sa). This ruling directly conflicts with the Second Circuit's conclusion that "the separation requirements are within the Secretary's authority." (52a).[4]

Second, the First Circuit concluded that § 59.8's requirement of compelled silence about abortion combined with mandatory referrals and information to protect the "unborn child" unconstitutionally encroaches on a woman's right to reproductive choice. (21-31sa). In so holding, the First Circuit explicitly differed with the Second Circuit's analysis of the relevance of *Harris v. McRae*, 448 U.S. 297 (1980), *Maher v. Doe*, 432 U.S. 464 (1977), and *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989), (35-36sa), agreeing instead with the analysis of the Eighth Circuit in *Webster v. Reproductive Health Servs.*, 851 F.2d 1071 (8th Cir. 1988), that was left undisturbed by this Court. (33-34sa). Whereas the Second Circuit found that the regulations at issue do not constitute an "affirmative legal obstacle" to a woman's right to choose abortion and that, in any event, a restriction on speech creates a lesser burden than the prohibition on the performance of abortion in public facilities upheld in *Webster*, 109 S. Ct. at 3050-53, (55-56a), the First Circuit found the regulations to "implicate more significant rights than those at issue in *Webster* and [to] create exactly the type of obstacle about which the *Webster* Court was concerned." (21sa). The First Circuit thus concluded that "by insisting on a one-sided flow of information to Title X clients and by prohibiting the provision of nondirective counseling," § 59.8

4 The First Circuit's reading of Title X also differed from that of the Second Circuit. Whereas the Second Circuit found the natural construction of § 1008 of the Act to "specifically exclude[ ]" counseling and referral for abortion, (48a), the First Circuit found the statutory language inconclusive. (9-10sa).

creates a "new and imposing obstacle to abortion" in violation of the Fifth Amendment and the rights recognized in *Roe v. Wade*, 410 U.S. 113 (1973), *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986). (31sa). *See also* 35-36sa (distinguishing Second Circuit opinion).

Third, the First Circuit held that §§ 59.8 and 59.10 infringe upon the right of free speech. The court found the regulations to be viewpoint-based and to "fall squarely on the unconstitutional side of the line" drawn in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983). (42sa). Moreover, the First Circuit found that the regulations impermissibly condition the receipt of public funds on the relinquishment of protected speech in violation of principles espoused by this Court in *Perry v. Sindermann*, 408 U.S. 593 (1972), and *FCC v. League of Women Voters*, 468 U.S. 364 (1984). (36-42sa).[5] In contrast, the Second Circuit held that the regulations "do not facially discriminate on the basis of viewpoint," (59a), and cited *Regan* in support of its conclusion that the government "need not subsidize the exercise of [speech] rights," (56a). Finally, the Second Circuit found that, because individuals remain free to speak about abortion outside the Title X project, the regulations do not impermissibly burden non-Title X funded speech. (57a).

In sum, the First Circuit's decision in *Massachusetts v. Secretary of Health and Human Services* creates a conflict among the circuits within the meaning of Supreme Court Rule 10.1(a). For this reason, as well as those outlined in the petition filed on March 1, 1990, the petition for a writ of certiorari in the instant case should be granted.

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5 Because the First Circuit found the Secretary to have exceeded his statutory authority in adopting § 59.9, it did not address the constitutional challenge to the separation requirement. It noted, however, that had it not found the requirements of physical and financial separation of § 59.9 contrary to Congressional intent, it would have "str[uck] them down on constitutional grounds," (41sa n.13), again a result that would conflict with the opinion of the Second Circuit which failed to address the constitutionality of § 59.9.

Dated: March 26, 1990

Respectfully submitted,

RACHAEL N. PINE
(Counsel of Record)
JANET BENSHOOF
LYNN PALTROW
KATHRYN KOLBERT
LOUISE MELLING
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800 ext. 520

NORMAN SIEGEL
ARTHUR N. EISENBERG
New York Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 382-0557

Attorneys for Petitioners Rust, et al.

Of Counsel:

LAURIE R. ROCKETT
Hollyer, Jones, Brady, Smith, Troxell, Barrett & Chira
342 Madison Avenue
New York, New York 10173
(212) 818-1110

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 88-1279

COMMONWEALTH OF MASSACHUSETTS, ET AL.,

Plaintiffs, Appellees,

—v.—

SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Walter J. Skinner, *U.S. District Judge*]

Before:

Campbell, *Chief Judge.*
Bownes, Breyer, Torruella and Selya,
Circuit Judges.

Alfred Mollin, Appellate Staff, Civil Division, Department of Justice, with whom *Stuart E. Schiffer*, Acting Assistant Attorney General, *Wayne A. Budd*, United States Attorney for the District of Massachusetts, *Joel Mangel*, Deputy Chief Counsel, Public Health Service, *Carol Conrad*, Attorney, Office of the General Counsel, Department of Health and Human Services and *John F. Cordes*, Appellate Staff, Civil Division, Department of Justice, were on brief for appellant.

James M. Shannon, Attorney General for the Commonwealth of Massachusetts, with whom *Ruth A. Bourquin*,

Assistant Attorney General, *David Cole*, of the Center for Constitutional Rights, *Wendy Warring* and *Hill & Barlow*, attorneys for Intervenor Mary Moe, were on brief for appellees.

James L. Feldesman, with whom *Susan D. Lauscher* and *Feldesman, Tucker, Leifer, Fidel & Bank* for National Family Planning and Reproductive Health Association and American Public Health Association, were on brief for appellees.

MARCH 19, 1990

OPINION EN BANC

BOWNES, *Circuit Judge*. The Secretary of Health and Human Services (HHS) appealed from an injunction issued by the district court of Massachusetts enjoining enforcement of regulations promulgated under Title X of the Public Health Services Act, 42 U.S.C. § 300 *et seq*. The regulations significantly alter HHS's interpretation of section 1008 of Title X, which provides that "[n]one of the funds appropriated under [Title X] shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. Prior to the promulgation of the new regulations, the Secretary construed section 1008 to prohibit the use of Title X funds to encourage or promote abortion but to permit nondirective counseling to pregnant women on all available medical and legal options, including abortion. The new regulations prohibit any counseling or referral for abortion services and redefine the scope of Title X projects to restrict privately funded abortion-related activities. The district court found that the new regulations represented an abrupt reversal of a longstanding agency policy, and concluded that each of the various provisions either exceeded the statutory authority of the Secretary or infringed upon constitutionally protected

activities. The court therefore enjoined the enforcement or application of the regulations.

A panel of this court heard argument on July 28, 1988 and affirmed the opinion of the district court with one judge dissenting in part. That opinion was withdrawn and an *en banc* hearing was held to consider the effect of the Supreme Court's decision in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), which was issued after the panel opinion. In *Webster*, a sharply divided Court upheld portions of a Missouri law that prohibited state funds or facilities from being used for abortions. The Court found that the Missouri law "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy." 109 S. Ct. at 3052 (quoting *Harris v. McRae*, 448 U.S. 297 (1980)). The Court relied upon and reaffirmed the holdings of *McRae* and *Maher v. Roe*, 432 U.S. 464 (1977) and upheld the validity of *Roe v. Wade*, 410 U.S. 113 (1973) and the right of reproductive choice. Thus *Webster* did not change the legal landscape upon which the panel opinion was based. We hold that although, with one exception, the regulations are permissible under the enabling statute, they are unconstitutional.

I. STATUTORY AND REGULATORY BACKGROUND

A. *The Title X Program*

The Family Planning and Services Population Research Act of 1970, which added Title X to the Public Health Service Act, authorizes the Secretary of Health and Human Services

> to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services . . . .

42 U.S.C. § 300(a). Title X grantees operate health care facilities offering a wide range of family planning information and services, including contraceptive prescriptions and coun-

seling on all choices that follow pregnancy, and referrals to other medical service providers.

The majority of Title X grantees are public health clinics. Many of these clinics provide abortion facilities on the same site as the Title X project, sharing many of the same staff and resources but relying on nonfederal funds for the abortion-related activities. Under the prior policy many of the Title X grantees provided women with abortion counseling and referrals. This longstanding agency policy was embodied in the Program Guidelines issued by HHS in 1981 which required that pregnant women be provided with "nondirective" counseling and referrals on alternative courses of action, such as prenatal care and delivery, infant care, foster care, adoption and abortion. *See* Program Guidelines for Project Grants for Family Planning Services (1981), *reprinted in* Joint Appendix (J.A.) at 71, 85.

No family planning project can be completely funded by Title X. 42 C.F.R. § 59.11(c). Projects that receive funds under Title X are required to provide nonfederal "matching funds" of at least 10% of the money provided through Title X. 42 U.S.C. § 300 a-4. In fact, "matching funds" comprise a much larger portion of the budget than the required 10%. *See, e.g.*, J.A. at 40-41, 55, 61-62. *See also Valley Family Planning v. North Dakota*, 661 F.2d 99, 100 (8th Cir. 1981) (Title X funds 33% of budget). This money is provided through state payments such as Medicaid, fees paid by the clients (based on a sliding scale) and private funds. At oral argument, the Secretary stated that federal government funds account for about 50% of the money received by Title X clinics.

Title X projects serve an estimated 14.5 million women. About a third of those who receive services are adolescents and approximately ninety percent of the women served had incomes below 150 percent of the poverty line. 131 Cong. Rec. S16860 (daily ed. Dec. 4, 1985). *See also* J.A. 40-41, 55, 61-62, 213. One of the most frequent reasons for an initial visit to a Title X family planning facility, particularly by adolescents, is for a pregnancy test. Program Guidelines for Project Grants and Family Planning Services, Public Health Service, 1981, J.A. at 71, 84.

B. *The New Regulations*

On February 2, 1988, the Secretary promulgated the superseding regulations that are at issue in this case. The relevant provisions are set forth in Appendix A. These regulations significantly alter the previous agency interpretation of Title X by prohibiting nondirective abortion counseling or referral and by enlarging the degree of financial and physical separation required between federally and nonfederally funded activities conducted by a Title X grantee.

The new regulations change many aspects of the existing regulations. Our focus will be on a few particular changes. First, some key definitions have been changed. In Section 59.2 the term "family planning" is redefined to refer solely to "preconceptional" services. The result, if the regulations are implemented, would render Title X funds no longer available for pregnancy or post-partum services. "Title X program" and "Title X project" are also redefined to include not only grant funds but also "grant-related income or matching funds." 42 C.F.R. § 59.2. By virtue of this change, the extensive prohibitions against counseling, referral and abortion-related activities in the regulations apply broadly to recipient generated income as well as to federal funds.

As mentioned, the regulations reverse the preexisting policy of nondirective counseling. 42 C.F.R. § 59.8. Specifically, they prohibit counseling or referral for abortion as a method of family planning and require that all Title X clients diagnosed as pregnant receive "a list of available providers that promote the welfare of mother and unborn child" as well as information "necessary to protect the health of the mother and unborn child." 42 C.F.R. § 59.8(a). In an emergency, a Title X entity may refer a client to a provider of "emergency medical services." *Id.* The regulations also specifically prohibit a Title X entity from circumventing the abortion prohibitions by using the list of referrals "as an indirect means of

encouraging or promoting abortion as a method of family planning." 42 C.F.R. § 59.8(a)(3). Finally, although a Title X entity may provide information that is medically necessary to assess the relative risks and benefits of various contraceptive methods, that information may not include the counseling or promotion of abortion. 42 C.F.R. § 59.8(a)(4).

The new regulations also require that Title X entities be "physically and financially separate" from entities providing proscribed activities or information. 42 C.F.R. § 59.9. The Title X entities must have "an objective integrity and independence" that reaches beyond separate bookkeeping to include separation of accounting records, facilities and personnel and even separate signs for the federally and nonfederally funded activities. *Id.*

Finally, the regulations contain a list of prohibited activities including lobbying for pro-choice legislation, providing speakers to promote the availability of abortion, paying dues to groups that advocate abortion and engaging in legal action or developing and disseminating materials to promote abortion as an option in the case of an unintended pregnancy. 42 C.F.R. § 59.10.

II. PROCEEDINGS BELOW

Appellees, the Commonwealth of Massachusetts, the National Family Planning and Reproductive Health Association (NFPRHA) and the American Public Health Association filed suit for declaratory and injunctive relief in federal district court on February 2, 1988. The district court allowed the intervention of Mary Moe, a low-income woman dependent upon a Title X entity for her health care needs.

In their joint complaint, appellees charged that the new regulations reversed a consistent and longstanding agency interpretation of Title X without any justification, and violated both congressional intent and the constitutional rights of Title X grantees and their clients. Appellees filed a motion for preliminary injunction on February 9, 1988, alleging that implementation of the regulations would undermine seriously

the quality and character of the Title X program. The Secretary opposed the motion for a preliminary injunction and moved that the action be dismissed, or, in the alternative, that summary judgment be granted.

The district court held a hearing on February 18, 1988, and issued a final decree on March 3, 1988, consolidating the preliminary injunction with a decision on the merits. In its opinion, the court addressed both the statutory and the constitutional issues. *Massachusetts v. Bowen*, 679 F. Supp. 139 (D. Mass. 1988). The court considered the various sections of the new regulations independently and found that the prohibition on abortion counseling and referral exacted a penalty for the exercise of protected speech. It also found that the prohibition constituted a content-based restriction unsupported by a compelling government interest. The court therefore enjoined the enforcement of section 59.8 on first amendment grounds.

The court then considered the restrictions on lobbying and advocacy. It found that section 59.10 had a more far-reaching effect than a mere refusal to subsidize. In light of the restriction on the use of nonfederal funds and the requirement of complete financial and physical separation contained in sections 59.2 and 59.9, the court held that the Secretary had imposed an unduly burdensome requirement on Title X grantees that was not narrowly tailored to meet the legitimate goal of not subsidizing advocacy. The court further found that section 59.10 constituted a content-based restriction that violated the first amendment and enjoined the enforcement of that provision. In addition, the court enjoined the enforcement of section 59.9, finding that the physical and financial separation requirement violated the congressional intent to create coordinated family planning services. And finally, the court concluded that the restriction imposed by the new regulations on the flow of neutral information concerning abortion to pregnant women violated the right to privacy as established in *Roe v. Wade*, 410 U.S. 113 (1973).

III. STATUTORY ANALYSIS

Because courts should only decide unavoidable constitutional questions, we begin our analysis with an inquiry into whether the new regulations exceed the Secretary's authority under Title X. *See, e.g., Harris v. McRae*, 448 U.S. 297, 307 (1980) (quoting *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944)); *Benoni v. Boston and Maine Corp.*, 828 F.2d 52, 57 (1st Cir. 1987).[1] The Secretary is empowered by the statute to promulgate regulations to ensure that the grants are made in accordance with the statute. 42 U.S.C. § 300a-3. The Secretary, of course, must issue regulations that implement the intention of Congress. Thus the interpretive question posed is

> whether Congress [has] directly spoken on the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). Four factors should be considered in attempting to ascertain congressional intent: (1) the language of the statute; (2) the contemporaneous legislative history; (3) any subsequent legislative history and (4) agency interpretation(s) of the statute. *Consumer Product Safety Comm. v. GTE Sylvania*, 447 U.S. 102, 108-120 (1980). If an examination of these factors does not reveal the legislative intent, then deference to the agency interpretation of the statute is appropriate *if* the agency interpretation "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Of course, less deference is due to an agency's position that is inconsistent with a prior consistently held

1 The Secretary, in supporting his construction of the statute as manifest in the regulations, seemingly urges us to consider the constitutional questions. He argues that if there are constitutional issues here "there is no construction of the regulations by which [they] can be avoided." Appellant's Reply Brief at 15.

agency view. *I.N.S. v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1221 n.30 (1987). With these guidelines in place, we turn to the statute.

1. *Statutory Language*

We start with the language of section 1008 of Title X: "None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. Both appellees and the Secretary contend that the "plain meaning" of this sentence requires the result they seek.

Appellees argue that the ordinary meaning of the words in the statute prohibits only the funding of abortions and does not reach the funding of abortion counseling or referral. Appellees also contend that section 1008's prohibition applies to programs funded by Title X and may not be extended to prohibit abortion activities funded privately by a recipient organization.

The Secretary disputes that reading and argues that the new regulations are consistent with the language of the statute. He contends that the new regulations more closely follow the prohibition of section 1008 by recognizing the importance of counseling and referral to family planning and by prohibiting any abortion-related activity in those areas and limiting the services of the clinics to only preconceptional services. The Secretary further argues that the prohibition on abortion stated in section 1008 limits the statutory language favoring integration and coordination of family planning services and that the program separation requirements of the new regulations are therefore consistent with the statute.

The statutory language is inconclusive. The prohibition in section 1008 is phrased broadly and is susceptible of many differing interpretations. *Accord* Memorandum from Joel M. Mangel, Deputy Assistant General Counsel, Division of Public Health Grants and Services, to Louis H. Hellman, M.D., Deputy Assistant Secretary for Population Affairs (Apr. 20, 1971), *reprinted in* J.A. at 108. It is not enough for appellees to show that the statutory language does not expressly forbid

counseling and referral or mandate complete physical and financial separation. The Secretary's construction does not contravene the express language of the statute itself. We must therefore look beyond the exact wording of section 1008 to attempt to assess the meaning of the statute. *Accord Planned Parenthood Fed'n of America v. Bowen*, 680 F. Supp. 1465, 1468 (D. Colo. 1988); *New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y.), *aff'd*, 863 F.2d 46 (2d Cir. 1989).

2. *Legislative History*

Appellees argue that Congress intended to provide a full range of information to Title X clinic clients and to coordinate *all* family planning services. The Secretary argues that Congress intended to fund only *preventive* family planning and that the new regulations are therefore more consistent with the legislative intent than the previous agency mandate for nondirective counseling.

The legislative history is inconclusive in most respects. The statement of purpose in the House Report preceding the passage of Title X stressed the importance of supplying both family planning services and a full range of family planning information and of developing a comprehensive and coordinated program. H. Rep. No. 1472, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 5068. The Conference Report stated that funding would be used only to support preventive family planning, with the caveat that Title X programs should be fully coordinated with state and local programs which by implication included programs that counselled or provided abortions. H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 5080, 5081. There is language in the legislative history that can be read as allowing non-grant money to be used for abortion related activity:

> The conferences have adopted the language contained in section 1008, which prohibits the use of such funds for abortion. The legislation does not and is not intended to interfere with or limit programs conducted in accordance with State or local laws and regulations which are supported by funds other than those authorized under this legislation.

Id. at 5082.

The Secretary attempts to bolster his legislative history argument by relying on a few comments by Congressman Dingell made during the House debate. Such comments are accorded little weight when compared with other tools of statutory interpretation. *Consumer Products*, 447 U.S. at 118; *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979). In addition, these comments are neither persuasive nor unambiguous.[2] Thus the legislative intent about the scope of the abortion prohibition is unclear.

There was clearly expressed legislative intent to expand the level of family planning services provided to low-income women and to coordinate family planning services. The district court ably surveyed this evidence:

> The legislative history of Title X offers persuasive evidence that the program integrity regulations run contrary to congressional intent underlying section 1008. The original Conference Report on Title X stated that the abortion prohibition was "not intended to interfere with or limit programs" supported with other than Title X funds. H.R. Conf. Rep. No. 1667, 81st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 5082. Furthermore, the Report of the Senate Labor and Public Welfare Committee for the 1975 reauthorization of Title X provided:
>
> > The Committee encourages the use of funds otherwise authorized by this bill for the provision of family planning services, not only in specialty clinics, but, where such facilities do not exist or are impractical, in entities devoted to comprehensive health care for low-income families. . . . [I]t is essential that there be

2 The Secretary attached to his brief comments received in response to the proposed regulations from Representative Dingell, in which Dingell claims that the Secretary misunderstands his statements in the congressional debate.

> close coordination and, whenever possible, integration of family planning services into all general health care programs.
>
> S. Rep. No. 63, 94th Cong., 1st Sess. 65-66 (1975), *reprinted in* 1975 U.S. Code Cong. & Admin. News 528.
>
> The contemporaneous and continuous agency interpretation was consistent with this view. Indeed, the statute itself mandates "a State plan for a coordinated and comprehensive program of family planning services." 42 U.S.C. § 300a(a) (1982). The requirement of physical separation runs contrary to this congressional emphasis on coordinated and integrated health care services.

Massachusetts v. Bowen, 679 F. Supp. at 143. Appellees submitted numerous affidavits stating that the new regulations would require many clinics either to give up their Title X funding or to terminate family planning services altogether. *See, e.g.*, Affidavit of Leslie Tarr Laurie, Executive Director of Family Planning Council of Western Massachusetts, *reprinted in* J.A. at 40, 41; Affidavit of Diane M. Booth, Executive Director of Planned Parenthood of Central Missouri, *reprinted* in J.A. at 55, 57; Affidavit of Karen Cody Carlson, Executive Director of Planned Parenthood of Greater Kansas City, *reprinted in* Joint Appendix at 61, 63; *and* Affidavit of Mary Russell, Director of Family Planning for Action for Boston Community Development, *reprinted in* J.A. at 213, 215. We agree with the district court that the requirement of physical and financial separation set forth in section 59.9 violates congressional intent because of the effect it would have of limiting family planning programs. That result would be completely contrary to the express Congressional intention to expand family planning services. We affirm the district court's conclusion that the promulgation of section 59.9 exceeds the Secretary's authority and we enjoin its enforcement.

3. *Subsequent Legislative History*

The contemporaneous legislative history does not directly address the issues of abortion counseling and referral or lobbying and advocacy, so we turn to subsequent legislative history for guidance. We are aware of the longstanding principle that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one" *Consumer Product Safety Comm'n*, 447 U.S. at 117-19 (footnote omitted) (*citing United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348-49 (1963) which quotes *United States v. Price*, 361 U.S. 304, 313 (1960)). We also recognize that subsequent legislative *history* provides an even shakier ground than subsequent legislative *action* from which to infer original intent. *Id.* at 118 n.13. Nonetheless, subsequent Congressional inaction may signal acquiescence to an agency interpretation. *Haig v. Agee*, 453 U.S. 280, 300-01 (citing *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965)) (the amendment of one statute, considered in light of the failure to amend another related statute, under which the Secretary of State had asserted broad powers, may indicate congressional acquiescence to the administrative construction of the unmodified statute). *Accord North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 534-35 (1982).

Congressional inaction in the face of agency action on a subject of heated national interest and debate also merits additional consideration and weight. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). In *Bob Jones Univ.*, the Internal Revenue Service changed a longstanding policy and issued a new ruling that denied tax-exempt status to private schools practicing racial discrimination. The Court upheld the agency ruling, stating:

> [F]ew issues have been the subject of more vigorous and widespread debate and discussion in and out of Congress than those related to racial segregation in education. Sincere adherents advocating contrary views have ventilated the subject for well over three decades. Failure of Congress to modify the IRS rulings of 1970 and 1971, of which Congress was, by its own studies and by public discourse, constantly reminded, and Congress'

> awareness of the denial of tax-exempt status for racially discriminatory schools when enacting other and related legislation make out an unusually strong case of legislative acquiescence in and ratification by implication of the 1970 and 1971 rulings.

Id. at 599.

Appellees analogize this case to *Bob Jones Univ.* They contend that the failure of Congress to amend section 1008, despite repeated amendments, reauthorizations and reenactments of Title X,[3] indicates acquiescence to the agency's preexisting policy of allowing nondirective counseling as provided for in the 1981 Program Guidelines. Appellees argue that this congressional inaction merits additional weight, under the principle of *Bob Jones Univ.*, because of the volatility and importance of the national controversy over abortion rights.[4]

The Secretary disagrees on two grounds. First, he argues that the subsequent legislative history of Title X reflects confusion over the scope of the abortion prohibition and therefore Congress cannot be deemed to have ratified an agency construction that it did not wholly understand. Second, he argues that, even if we could infer ratification of the previous agency interpretation, such ratification would merely reflect acquiescence to a prior policy—it would not indicate that the Secretary's new policy exceeds his statutory authority.

The Secretary's second argument is persuasive. Although appellees have stated a strong case for congressional acquiescence, the ratification of one agency policy by Congress does not preclude a change in that policy. In *Bob Jones Univ.*, congressional acquiescence in agency policy was used as proof that an agency was acting within its statutory authority. Here appellees would use congressional acquiescence

3 Title X has been reauthorized six times. *See Brief of Amici Curiae Rep. Patricia Schroeder et al.* 17 n.16 (collecting citations).

4 The Colorado federal district court found this argument persuasive in its analysis of the new Title X regulations. *See Planned Parenthood Federation of America v. Bowen*, 680 F. Supp. 1465, 1472 (D. Colo. 1988) ("Congressional refusal on repeated occasions to change its policy permitting the neutral dissemination of information about abortion represents ratification of said policy.").

to prior agency policy as proof that a change in that policy is beyond the scope of its statutory mandate. The Court rejected similar reasoning in *Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29 (1983). In that case, the Court reviewed a decision of the Secretary of Transportation to rescind a requirement that automobiles be equipped with passive restraints and held that previous congressional support for the passive restraint requirement did not preclude a change in policy:

> While an agency's interpretation of a statute may be confirmed or ratified by subsequent congressional failure to change that interpretation . . . in the cases before us, even an unequivocal ratification—short of statutory incorporation—of the passive restraint standard would not connote approval or disapproval of an agency's later decision to rescind the regulation.

Id. at 45 (citing *Bob Jones Univ.*, 461 U.S. at 599-602; and *Haig*, 453 U.S. at 291-300). Similarly, in the present case, congressional support for a narrow reading of the abortion prohibition does not necessarily indicate that the new regulations violate congressional intent.

4. *Contemporaneous Agency Policy*

An agency's contemporaneous construction of its founding statute should be given deference. Moreover, a contemporaneous construction "deserves special deference when it has remained consistent over a long period of time." *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981) (citations omitted). *Accord Andrus v. Shell Oil Co.*, 446 U.S. 657, 667-68 (1980). Such deference is necessary because a contemporaneous construction is more likely to reflect the intent of the enacting Congress. *See St. Luke's Hosp. v. Secretary of Health and Human Servs.*, 810 F.2d 325; 331 (1st Cir. 1987).

Appellees argue that the agency's contemporaneous and consistent interpretation of section 1008 to permit nondirective counseling and to encourage coordination with local and

state family planning services is entitled to substantial deference. The Secretary construes the contemporaneous policy of HHS differently. He argues that the thrust of prior policy was a prohibition on any encouragement or promotion of abortion; the new regulations remain true to that policy and merely readjust the level at which prohibited encouragement is deemed to commence.

The Secretary's position is untenable. We agree with both the court below and the district court in Colorado that the new regulations constitute a radical break from a prior consistent policy permitting nondirective counseling: "[F]rom the time Congress enacted § 1008 in 1970, [the Secretary] consistently interpreted it to permit the neutral dissemination of information about abortion, and the referral upon request to entities which provide abortion." *Planned Parenthood Fed'n of America*, 680 F. Supp. at 1471.

There are three independent interpretations of section 1008 that support our conclusion. First, a 1971 memorandum from the office of General Counsel to the Deputy Assistant Secretary for Population Affairs states that, although section 1008 should be read broadly to prohibit any encouragement or promotion of abortion, it should not be read so broadly as to impede the coordination of family planning activities. *See* Memorandum from Joel M. Mangel, *reprinted in* J.A. at 110. Second, a report from the office of the General Counsel to the Senior Attorney, Public Health Division, states:

> This office has traditionally taken the view that § 1008 not only prohibits the provision by Title X grantees of abortion as a method of family planning by the Title X-supported program. Under this view, *the provision of information concerning abortion services, mere referral of an individual to another provider of services for an abortion*, and the collection of statistical data and information regarding abortion *are not considered to be proscribed by § 1008*. The provision of "pregnancy counselling" in the sense of encouraging persons to obtain abortions and the provision of transportation to

> persons to enable them to obtain abortions, on the other hand, are considered to be proscribed by § 1008.

Memorandum from Elsie Sullivan, Assistant for Information and Education, Office of Family Planning, to Senior Attorney, Public Health Division (Apr. 1, 1978), *reprinted in* J.A. at 113, 114-15 (footnotes omitted) (emphasis added). And finally, the 1981 Program Guidelines issued by HHS specifically require nondirective counseling for pregnant women:

> Pregnant women should be offered information and counseling regarding their pregnancies. Those requesting information on options for the management of an unintended pregnancy are to be given nondirective counseling on the following alternative courses of action, and referral upon request:
>
> * Prenatal care and delivery
> * Infant care, foster care, or adoption
> * Pregnancy termination

Program Guidelines for Project Grants for Family Planning Services, *reprinted in* J.A. at 85. The record, therefore, reflects a consistent agency interpretation that permitted nondirective counseling, encouraged coordination of all family planning services and prohibited only active encouragement or promotion of abortion.

Such a contemporaneous agency construction is compelling but we cannot conclude on the basis of this evidence alone that the congressional intent is unambiguous. Congress has not addressed specifically the question of the scope of the abortion prohibition. The language of the statute and the legislative history can support either of the litigants' positions. Therefore, we must determine whether the new regulations are a *permissible* construction of Title X. *See Chevron* 467 U.S. at 842-43.

5. Deference to the Agency Construction

The district court found that the Secretary had failed to justify the change in policy embodied in the new regulations.

In its opinion, the court held the regulations to a heightened standard of review: "[W]hen an agency decides to change the course of a longstanding administrative interpretation, it must justify its action to a greater degree than when it first promulgates regulations." 679 F. Supp. at 141-42 (citing *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 41-42). We find heightened scrutiny unwarranted.

When an agency rescinds or modifies a policy, its actions are subject to the same standard of review as that applied to the original promulgation of a policy: the arbitrary and capricious standard. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 41. Such review, although narrow, is still broader than that accorded to a refusal to promulgate rules in the first instance:

> [T]he revocation of an extant regulation is substantially different than a failure to act. Revocation constitutes a reversal of the agency's former views as to the proper course. . . . Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

Id. at 41-42. The heightened standard referenced by the district court is adjudged in comparison to a refusal to act, not in comparison to a previous promulgation of rules. *Cf. Heckler v. Chaney*, 470 U.S. 821 (1985) (agency refusal to take enforcement action presumptively unreviewable). The standard of review applicable to both original agency action and agency rescission or modification of a prior standard requires the agency action to be "rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute." *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 42. Applying this standard to the case at bar, we must decide whether the Secretary has provided a "reasoned analysis" for the change in agency policy.

The Secretary advances two bases for the new regulations. *See* 53 Fed. Reg. 2922 *et seq.* (Feb. 2, 1988), *reprinted in* J.A. at 169. First, he argues that the new regulations more closely conform to the language of section 1008. *See* 53 Fed. Reg. at 2923. We have already found that the statutory language is ambiguous and susceptible to differing interpretations so that the argument is unpersuasive. Second, the Secretary argues that, even if not mandated by the express language of section 1008, the new regulations more "faithfully and effectively" implement the abortion prohibition. 53 Fed. Reg. at 2923. The Secretary cites reports by the Office of the Inspector General (OIG) and the General Accounting Office (GAO) to support his assertion that Title X projects required guidance "to preserve the distinction between Title X programs and abortion as a method of family planning." *Id.*

The reports provide a very slim reed of support. Both reports found that Title X grantees were aware of and acted in accordance with the prohibition against the encouragement or promotion of abortion.[5] The two reports did suggest, how-

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5 The GAO summarized the agency's construction of that prohibition as follows:

> Based on HHS' legal opinions, the following types of activities related to abortions are allowable under title X programs. Recipients *may*:
> — provide information about abortion services;
> — provide the name, address, and telephone number of abortion providers;
> — collect statistical data and information regarding abortion;
> — inspect facilities to determine their suitability to provide abortion services;
> and
> — pay dues to organizations that advocate the availability of abortion services.
> Recipients *may not*
> — provide counseling that encourages a person to obtain an abortion,
> — provide transportation to an abortion center or provider,
> — provide proabortion speakers to debate the issues in public forums,
> — advocate the need and suitability of abortion service in the community,
> — produce or show movies that tend to encourage or promote a favorable attitude toward abortion,

ever, that the Secretary clarify the agency's preexisting policy position on abortion-related activities. The GAO report further suggested that, given the sensitivity of the abortion controversy, the agency might look to Congress for any further guidance on the scope of the abortion prohibition. The OIG and the GAO reports only called for a clarification of existing standards. The Secretary construes the reports more broadly and argues that the suggestion of clarification provides support for the promulgation of wholly new and modified regulations.

Were we to apply a heightened standard of review, we well might find the Secretary's rationale lacking; however, our scope of review is narrow. We must " 'uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned.' " *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43 (quoting *Bowman Transp. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 286 (1974)). We may not apply a heightened scrutiny to the actions of the Secretary in order to avoid the more difficult constitutional issues raised by the abortion controversy.[6] Although these facts present a very close case, we cannot say that the Secretary has failed utterly to provide a reasoned basis for change. We must defer to the agency construction of the statute.

— provide abortion as a suitable backup method of family planning,
— make specific appointments or referrals for an abortion unless medical conditions warrant,
— bring legal action to liberalize abortion-related statutes, and
— pressure local governing bodies to change restrictive abortion policies.

Report by the Comptroller General (Sept. 24, 1982), *reprinted in* J.A. at 125, 144-45.

6 *Cf. Roe v. Wade*, 410 U.S. at 116 ("We . . . acknowledge . . . the sensitivity and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. . . . Our task . . . is to resolve the issue by constitutional measurement, free of emotion and of predilection.")

6. *Conclusion*

Our examination of the traditional elements of statutory construction yields the following results. The plain words of the statute are susceptible to differing interpretations. The contemporaneous legislative history is inconclusive, except on the issue of program coordination. The subsequent legislative history indicates congressional acquiescence to the previous agency policy promoting nondirective counseling, but this acquiescence does not preclude a change in agency policy. And finally, because of the deference due an agency's interpretation of an enabling statute, the Secretary's new policy is not impermissible under the statute. We turn therefore to the constitutional questions presented by the new regulations.

IV. THE RIGHT OF REPRODUCTIVE CHOICE

Appellees argue that even if the counseling and referral regulations do not violate Title X, they are an unconstitutional encroachment upon a woman's right to reproductive choice because they impermissibly restrict the information a Title X client receives during pregnancy counseling and by impermissibly restricting the contours of the physician-patient relationship in a Title X project. *Roe v. Wade*, 410 U.S. 113 (1973). The Secretary attempts to refute that contention with the bald assertion that the regulations merely implement a funding decision to support childbirth over abortion and that the regulations impose no obstacle whatsoever to a woman's choice between those alternatives. *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989); *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464. We find the Secretary's reliance on *Webster*, *Maher* and *McRae* misplaced.

We note first that the HHS regulations implicate more significant rights than those at issue in *Webster* and that the regulations create exactly the type of obstacle about which the *Webster* Court was concerned. *Webster* did not involve a first amendment issue and, as the Court explicitly noted, the Missouri statute only concerned funding of abortions and not

the conduct of physicians. 109 S. Ct. at 3053. For these reasons, *Webster* does not dictate a reversal as the Secretary urges.

Because the new regulations do pose a significant obstacle to a Title X client's decision to terminate her pregnancy by curtailing her ability to receive counseling on abortion from the physician responsible for her medical care. We therefore find them unconstitutional.

Our analysis starts with the uncontested proposition that the Constitution protects a woman's independence in making "certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (footnote omitted). *See also Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). That protection extends to decisions concerning both childbirth and the termination of a pregnancy. *See Roe v. Wade*; *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Thornburgh*, 476 U.S. at 747.

To ensure independence in a woman's decisionmaking, the Supreme Court has rejected attempts to intrude into the dialogue between a woman and her physician. *See, e.g., Akron*, 462 U.S. at 442-47; *Thornburgh*, 476 U.S. at 763-765. In *Akron* and *Thornburgh*, the Court invalidated informed consent provisions designed to influence a woman's choice between childbirth and abortions, reaffirming a woman's right "in consultation with her physician, to decide to have an abortion and to effectuate that decision 'free of interference by the state.' " *Akron*, 462 U.S. at 429-30 (quoting *Roe v. Wade*, 410 U.S. at 163) (footnote omitted). *See also Thornburgh*, 476 U.S. at 761-64.

In *Akron*, the Court struck down a city ordinance that required, *inter alia*, a woman's physician to make specified statements to the patient prior to performing an abortion in order to ensure that the woman's consent was "truly informed." *Id.* at 423. The ordinance was unconstitutional for two "equally decisive" reasons. *Id.* at 445. First, the ordinance required that "dubious facts" be provided in order to manipulate a woman's choice between childbirth and abortion. As the Court stated, "It is fair to say that much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether." *Id.* at 444. Second, the Court found that, by requiring a physician to provide specified information to a client, the ordinance placed a physician in an " 'undesired and uncomfortable straightjacket.' " *Id.* at 445 (quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67 n.8 (1976)). The Court stressed the role of the doctor in the woman's decision stating that "it remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances." *Id.* at 443. The Court concluded:

> By insisting upon recitation of a lengthy and inflexible list of information, Akron unreasonably has placed 'obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision.'

Id. at 445 (quoting *Whalen v. Roe*, 429 U.S. at 604 n.33) (footnote omitted).

Both of *Akron*'s "equally decisive" reasons were used by the Court in striking down the informed consent provision at issue in *Thornburgh*. The Court warned that, although informed consent provisions were not unconstitutional as a general rule, "the State may not require the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.' " *Thornburgh*, 476 U.S. at 760 (quoting *Akron*, 462 U.S. at 443-444). The state statute at issue required that a list of agencies offering alternatives to abortion and a description of fetal development be provided. The Court described those materials as "an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician." *Id.* at 762. The Court explicitly condemned the requirement of a list of agencies providing alternatives to abortion as a distortion of the physician-patient relationship:

> Even the listing of agencies . . . presents serious problems; it contains names of agencies that well may be out of step with the needs of the particular woman and thus places the physician in an awkward position and infringes upon his or her professional responsibilities. Forcing the physician or counselor to present the materials and the list to the woman makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list. . . . All this is, or comes close to being, state medicine imposed upon the woman, not the professional medical guidance she seeks, and it officially structures—as it obviously was intended to do—the dialogue between the woman and her physician.

Id. at 762-63 (citation omitted).

The regulations at issue here attempt to structure the physician-patient dialogue and thereby influence a woman's choice between childbirth and abortion even more completely than the informed consent provisions at issue in *Akron* and *Thornburgh*. Not only do the regulations *require* the Title X project to furnish all clients with "a list of available providers that promote the welfare of the mother and unborn child," but they also *forbid* Title X projects from providing "counseling concerning the use of abortion as a method of family planning or . . . referral for abortion as a method of family planning." 42 C.F.R. § 59.8(a).

The requirement that a list of agencies offering prenatal care be provided, standing alone, could well be enough to strike down the entire set of regulations because it attempts to persuade a woman to opt for childbirth over abortion by presenting limited and biased information and by rendering the decision to abort more difficult. Furthermore, the requirement forces the attending physician to endorse providers that "well may be out of step with the needs of the particular woman." The listing of agencies does not stand alone, however. By coupling that requirement with a prohibition against nondirective counseling or referral to an abortion provider, regardless of the doctor's judgment concerning the

most appropriate medical care or the woman's request for specific information, the Secretary has intruded even further into constitutionally protected decisionmaking.

Read together, the new regulations force all Title X projects to provide incomplete and skewed information and to withhold requested, possibly even medically advisable, information. Paraphrasing *Thornburgh*, we find:

> The [federal government is] not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies. Appellant[ ] claim[s] that the [regulations] before us today further legitimate compelling interests of the [government]. Close analysis of those [regulations], however, shows that they wholly subordinate constitutional privacy interests and concerns with maternal health in an effort to deter a woman from making a decision that, with her physician, is hers to make.

Id. at 759.

The regulations also run afoul of our holding in *Planned Parenthood League of Massachusetts v. Bellotti*, 641 F.2d 1006 (1st Cir. 1981), in which we invalidated a twenty-four hour waiting period requirement contained in a Massachusetts statute regulating abortions because it constituted "a substantial state-created burden on a woman's fundamental right," unjustified by a compelling state interest. *Id.* at 1015. The waiting period posed a substantial burden because the delay increased the medical risks of abortion and increased the ancillary costs to a woman desiring an abortion:

> [T]he fact that the form must be signed at least 24 hours prior to an abortion necessitates that a woman undertake at least two separate trips to obtain an abortion. . . . This effect necessarily imposes burdens in terms of time, money, travel and work schedules; for many women, particularly the poor, the rural, and those with pressing obligations, these burdens will be substantial.

Id. (citations omitted). *Accord Akron*, 462 U.S. at 450-51 (twenty-four hour waiting period invalid because it intrudes upon physician discretion). Similar burdens are imposed upon Title X clients under the new regulations. By prohibiting non-directive counseling and eliminating all agencies providing abortions from referral lists, the regulations impose substantial delay and additional costs upon a woman desiring to terminate her pregnancy. Some low-income women may be unable to obtain any information on abortion at all without the help of Title X clinic. For others, the delay between the moment when they learn of their pregnancy and the time they obtain information on abortion may greatly increase the risks inherent in the abortion procedure.[7]

Our discussion in *Bellotti* of the Massachusetts informed consent requirement is also informative. The consent form mandated by the statute required a discussion of the abortion procedure, a description of fetal development and a statement that the decision *not* to abort would not constitute grounds for the denial of public assistance. We found that although the form "comes close to an impermissible intrusion into the physician-patient relation," several factors saved it from invalidity. 641 F.2d at 1017. Most importantly, we noted that the statute did not require a physician personally to read the form to the patient or to verify that she had read it herself, and that a physician could offer any additional information she felt necessary: "[T]he physician remains completely free to give any additional information desired regarding abortion, whether complementary to or contradictory of the information contained in the . . . form." *Id.* at 1017-18 (footnote omitted). That saving characteristic is not

7 Dr. George Morley, president of the American College of Obstetricians and Gynecologists, stated in his affidavit that the delay caused by the new regulations might endanger women by pushing the time of abortion into the second trimester of pregnancy. He explained: "Abortions performed later in pregnancy are closely associated with increased morbidity and mortality risks. For example, although only a small percentage of abortions are performed during the second trimester of pregnancy, they caused approximately half of all abortion-related deaths between 1972 and 1981." Affidavit of George W. Morley, M.D., *reprinted in* J.A. at 27, 30.

present in the new regulations. To the contrary, the regulations prohibit a wide range of additional information. According to Dr. Morley, this prohibition not only endangers the health of the woman, but it also contravenes medical ethics:

> [I]f all a health care professional is able to do in a situation where medical treatment is indicated is to advise the patient of the diagnosis and refer, such a limitation also would violate medical ethics and standard of practice. When a condition warranting treatment is diagnosed, even if referral is required, it is necessary to counsel on all options (including abortion) and make a referral consistent with the patient's informed decision.

Affidavit of Dr. George W. Morley, *reprinted in* J.A. at 32. The regulations, therefore, not only attempt to influence a woman's decision but they also place a straightjacket on the physician, forcing her to depart from accepted standards of practice. The Court explicitly has rejected such regulation. *See Akron*, 462 U.S. at 431 (state may not regulate in manner which causes departure from "accepted medical practice").

The effect of the new regulations is to infringe upon women's freedom of reproductive choice by denying them access to important information and by interfering with the physician-patient relationship. These encroachments most often occur during the first trimester of pregnancy, when a woman's privacy interests are most unrestricted:

> [F]or the period of pregnancy prior to [the end of the first trimester], the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

Roe, 410 U.S. at 163. We recognize, of course, that even during the first trimester, a woman's privacy right is not absolute. In *Akron*, the Court held:

> Certain regulations that have no significant impact on the woman's exercise of her right may be permissible where justified by important state health objectives. . . . But even these minor regulations on the abortion procedure during the first trimester may not interfere with the physician-patient consultation or with the woman's choice between abortion and childbirth.

462 U.S. at 430 (citation omitted).

In his brief, the Secretary has neither argued that the regulations advance important health objectives nor refuted appellees' contention that they interfere with the physician-patient dialogue and a woman's freedom of reproductive choice. Rather the Secretary has relied solely on *Webster*, *Maher*, and *McRae* claiming that the regulations reflect a legitimate funding decision to favor childbirth over abortion. Those cases do not change our result.

In *Webster*, the Court reversed an Eighth Circuit opinion that had declared the public funding restrictions of a Missouri abortion law unconstitutional. The law prohibited public facilities from being used for or public employees from performing or assisting most abortions. In upholding the law, the Court relied upon and reaffirmed the teachings of *McRae* and *Maher*, *Webster*, 109 S. Ct. at 3051-53. The Court stated that Missouri's choice "to use public facilities and staff to encourage childbirth over abortion 'places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy.' " *Webster*, 109 S. Ct. at 3052 (*quoting McRae*, 448 U.S. at 315.)

The Eighth Circuit had also struck down a portion of the Missouri law that prohibited the use of state funds or facilities for counseling or encouraging a woman to have an abortion. In addition, state employees were prohibited from counseling or encouraging abortions. The State did not appeal the decisions on the uses of state facilities or employees for counseling, so those rulings still stand. In appealing the limitation on the use of state funds for counseling, Missouri construed the law as only limiting the actions "of those persons responsible for expending public funds" and stated

that the restriction "is not directed at the conduct of any physician." *Webster*, 109 S. Ct. at 3053. Because of that limiting definition, the Webster plaintiffs were no longer adversely affected by the law and the Eighth Circuit's decision was unanimously held moot. *Webster*, 109 S. Ct. at 3053-54. In discussing the mootness issue several justices noted that if the ban were interpreted to "prohibit publicly employed health professionals from giving specific medical advice to pregnant women," a serious controversy would exist. *Id.* at 3060 (O'Connor, J., concurring); *Id.* at 3068-69 n.1 (Blackmun, Brennan, and Marshall, JJ., concurring in part and dissenting in part).

In *Maher*, the Court upheld a regulation promulgated by the Connecticut Welfare Department that limited state Medicaid benefits for first trimester abortions to those which were deemed medically necessary. The Court found that although the regulations may well have rendered childbirth a more "attractive alternative," they imposed no restrictions on a woman's access to abortion and thereby did not infringe upon her constitutional right to reproductive choice. 432 U.S. at 474. The court explicitly distinguished the regulations under consideration from a government effort to restrict a woman's freedom in decisionmaking: "Our conclusion signals no retreat from *Roe* or the cases applying it. There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher*, 432 U.S. at 475 (footnote omitted).

The Court affirmed *Maher*'s reasoning in *McRae* by upholding an amendment to Title XIX of the Social Security Act that restricted the use of federal Medicaid funds to support certain medically necessary abortions. The Court explained that the amendment created no obstacle to a woman's freedom of choice: "The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency." *McRae*, 448 U.S. at 316 (citing *Maher*).

The emphasis in both *Maher* and *McRae* was on preexisting limitations on a woman's access to abortion which the government failed to alleviate through funding.[8]

The distinction between refusals to fund abortion and incursions upon the decisional process is explicitly recognized and illustrated by a juxtaposition of text and footnote in *Akron*. In the body of its opinion, the Court stated that while some informed consent provisions *may* pass constitutional muster, the state could not attempt to direct the flow of information on abortion through such provisions:

> This does not mean, however, that a State has unreviewable authority to decide what information a woman must be given before she chooses to have an abortion. It remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances. *Danforth*'s recognition of the State's interest in ensuring that this information be given will not justify abortion regulations designed to influence the woman's informed choice between abortion or childbirth.

Akron, 462 U.S. at 443-44. In a footnote to this passage, the Court distinguished state provisions designed to effect the

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8 *See, e.g.*, the hypothetical case discussed in *McRae*:

> A substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion. This would be analogous to *Sherbert v. Verner*, 374 U.S. 498, where this Court held that a State may not, consistent with the First and Fourteenth Amendments, withhold *all* unemployment benefits from such a claimant who would otherwise be eligible for such benefits but for the fact that she is unwilling to work one day per week on her sabbath.

448 U.S. at 317 n.19. Similarly in *Maher* the Court stated that

> If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to benefits, we would have a close analogy to the facts in *Shapiro [v. Thompson]*, and strict scrutiny might be appropriate . . . .

432 U.S. at 474 n.8.

decisional process by regulating the flow of information from the provisions at issue in *Maher* and *McRae* which merely provided financial support for a policy choice: "This legislation to further an interest in preferring childbirth over abortion was permissible . . . only because it did not add any 'restriction on access to abortions that was not already there.' " *Akron*, 462 U.S. at 444 n.33 (citing *Maher*, 432 U.S. at 474). As we mentioned initially, *Webster* reaffirmed the validity of *McRae* and *Maher*.

V. OBSTACLES TO ABORTION CREATED BY THE REGULATIONS

In the instant case, the Secretary's policy does not merely fail to remove obstacles to abortions—it creates obstacles. By insisting upon a one-sided flow of information to Title X clients and by prohibiting the provision of nondirective counseling, the regulations place significant limitations upon a woman's freedom of reproductive choice. In *Akron*, the Court specifically recognized that denial of information about abortion (rather than funding) was an impermissible obstacle. *Akron*, 462 U.S. at 445. Due to the combination of government compelled disclosures and nondisclosure, a Title X client will make a decision concerning her pregnancy based upon a distorted consultation marred by medically incomplete information and referrals. *Cf.* Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 Harv. L. Rev. 1916, 1921-22 (1988) (government sponsored programs prohibited from providing abortion counseling or referral "manipulate the abortion decision itself by deliberately providing distorted information.") (footnote omitted). Both *Maher* and *McRae* emphasized that the contested provisions left the woman's decisional process intact; in the instant case, that process is undermined through a government crafted restructuring of the physician-patient dialogue. Regulating the substance of the dialogue between physician and patient in order to influ-

ence a woman's decision concerning her pregnancy creates a new and imposing obstacle to abortion.

We are particularly struck by the effect these restrictions have on poor women who are forced to rely on Title X clinics. They are significantly worse off than they would have been if the government had not provided the clinics because they have received misinformation rather than no information about their options. In addition, because most Title X clients pay a portion of the cost of the services (based on a sliding scale), the client's ability to go elsewhere has been significantly diminished because she has already paid what she could afford to the Title X clinic.

The regulations create an additional obstacle by restricting the private funds available for abortion counseling and services. As we have said before, "the abortion funding cases stand for the proposition that the state cannot refuse to make grants to an organization that encourages or performs abortions if those abortion related funds are derived from nongovernmental sources." *Student Government v. Bd. of Trustees*, 868 F.2d 473, 481 (1st Cir. 1989).[9]

By not only refusing to fund abortions, but also restricting nongovernmental money that may be used for abortion services, these regulations create an additional obstacle in the exercise of a woman's right to reproductive choice.

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9 Assuming that *Student Government v. Bd. of Trustees*, 868 F.2d 473 (1st Cir. 1989) is controlling, as Judge Torruella argued in his dissent to the panel opinion, that opinion does not change our holding. *Student Government* stands for the proposition that the government may stop funding of activities that it is not required to fund based on the content of the activity. That holding is consistent with, and in fact relies upon, *McRae* and the other abortion funding cases. But *Student Government* is significantly different from the position urged here by the government. It did not involve any limitation upon the exercise of first amendment rights, only a limitation on the funding of those rights. In addition, it did not place any limitation on the use of private money to fund the activities that the government would no longer support. Finally, the result of *Student Government* was that the government would not fund certain activity, rather than as here, that agency clients will be affirmatively misled.

VI. OTHER COURT DECISIONS ON TITLE X FUNDING

Other courts have declared unconstitutional the obstacle to abortion created by government limitations upon the flow of information. In *Planned Parenthood Assoc. v. Kempiners*, 531 F. Supp. 320 (N.D. Ill. 1981), *vacated and remanded on other grounds*, 700 F.2d 1115 (7th Cir. 1983), *aff'd on reh'g*, 568 F. Supp. 1490 (N.D. Ill. 1983), the court held that a state statute denying funding to programs directed at problem pregnancies solely because such programs offered abortion counseling and referral unconstitutionally interfered with a woman's right to reproductive choice. The court stated:

> The state may seek to encourage women to make a voluntary and intelligent decision not to terminate their pregnancy, but it may not seek to encourage women to make this decision in ignorance. In *Maher* and *McRae*, the State merely declined to subsidize abortion. It did not seek to preclude women from making an independent and knowing bearing choice. Here, the state does seek to impair the intelligence and independence of the woman's choice. That goal is constitutionally impermissible, and the state may not make funding choices on such impermissible bases.

531 F. Supp. at 329 (citation omitted). Similarly, in *Planned Parenthood Fed. of America*, 680 F. Supp. 1465, a Colorado federal district court enjoined the enforcement of the regulations currently before us, holding *inter alia*, that the regulations violated a woman's right to decide whether to terminate her pregnancy by restricting the flow of information necessary to make that decision: "Restricting a woman's only means of access to vital information renders her right to decide whether to have an abortion largely illusory." *Id.* at 1475.

The circuit court in *Webster* decided a similar issue, and reached a similar conclusion which was not appealed to the Supreme Court. *Reproductive Health Servs. v. Webster*, 851 F.2d 1071 (8th Cir. 1988). The Eighth Circuit declared unconstitutional the prohibition in the Missouri abortion reg-

ulation statute against the use of public funds, employees or facilities to encourage or counsel a woman to have an abortion. The court rejected the state's reliance upon *Maher* and *McRae*:

> We think that the state's analogy of its ban on 'encouraging or counseling' to bans on public abortion funding is completely inapt. Missouri is not simply declining to fund abortions when it forbids its doctors to encourage or counsel women to have abortions. Instead, it is erecting an obstacle in the path of women seeking full and uncensored medical advice about alternatives to childbirth. The state's limitation on doctor-patient discussions reflects the state's choice for childbirth over abortion in a way that prevents the patient from making a fully informed and intelligent choice.
>
> This state-created obstacle to exercise of the right to choose an abortion thus is far-removed from a state's refusal to remove obstacles not of its own creation. . . . We can perceive of few obstacles more burdensome to the right to decide than a state-imposed blackout on the information necessary to make a decision. We therefore affirm the district court's judgment that the state's ban on "encouraging or counseling" is an unconstitutional infringement of the right to choose an abortion protected by the fourteenth amendment.

Id. at 1080.[10]

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10 Another court has struck down additional HHS regulations that seek to implement the regulations that are at issue here by creating stricter reporting requirements for abortion "advocacy" groups. *Planned Parenthood Federation of America v. Sullivan*, slip op. 88-5565 (E.D.Pa. Dec. 7, 1989). The district court held that the regulations violated Title X and the first amendment. It stated

> [i]t is apparent that [the] revised [regulations] are no more than a fairly obvious attempt on the part of HHS to circumvent the APA, Title X, and the Constitution, in order to accomplish administratively what Congress could not be persuaded to do and to evade judicial review by issuing substantive rules in the guise of interpretive ones. I hold, therefore, that [the regulations] are illegal and unconstitutional.

Slip op. at 19.

We recognize that the Court of Appeals for the Second Circuit has upheld the same regulations that are challenged here. *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989). That court relied heavily on *Webster*'s reaffirmance of *McRae* and *Maher*. As we have noted, we do not think that those cases require reversal here. Our fundamental disagreement with the majority in *New York v. Sullivan* stems not from a different reading of Supreme Court cases, but rather from our different reading of the language of the regulations. The Second Circuit, it appears to us, ignored the fact that private money ("matching funds") is tied up and held hostage to the same restrictions as Title X funds because of the new definition of the "Title X program" in the regulations. Its opinion treats the regulations as if they only applied to federal money without also placing significant conditions on matching funds. For this reason the Second Circuit refused to give serious consideration to *Thornburgh* and *Akron*. It distinguished *Akron* and *Thornburgh* on the ground that those cases did not involve public funds, only the regulation of information. *Id.* at 413. But if information restrictions are invalid in general, how can they be valid in the limited situations of public funds? It is axiomatic that the government cannot do indirectly (i.e. through funding decisions) what it cannot do directly.

The Second Circuit's sweeping affirmation of the Secretary's power to write regulations that impose significant burdens on Title X programs and upon the rights of individuals is qualified in two paragraphs at the end of the opinion. These qualifications throw into sharp relief our differences. The first qualification discusses what would arise if a doctor were to treat a "private patient" in a Title X clinic. *Id.* at 413-414. The Second Circuit seemed to feel that this would raise an important issue and that it was not present in these regulations (or at least in the record before the court). We understand the thrust of the new regulations is to prevent exactly that. The regulations prohibit a "private patient" from being treated in a Title X clinic and a doctor in a Title X clinic from having "private patients" treated there. That is the clear intent of the new definitions and the integrity regu-

lations. The majority of the Second Circuit panel ignored this significant limitation imposed by the regulations.

The second qualification in the Second Circuit's opinion (that the regulations are neutral because they limit both "pro and con" advocacy about abortion) was dealt with by Judge Kearse in her thoughtful dissent. The majority states that the regulations are neutral because they prohibit any discussion about abortion. It is naive to assert that not talking about abortion to a pregnant women when discussing her options is value-neutral. In addition, the regulations are not even facially neutral because they allow postconceptional counseling in the best interests of the unborn child but not regarding abortion. By discussing only what is best for the unborn child, the counselor has already made the woman's choice. The Government, in restricting the counselor's options to that choice, enforces its choice.

We find that the prohibition in the regulations against counseling or referral with respect to abortion imposes constraints upon a woman's freedom to make reproductive decisions. This limitation upon a woman's range of choice in deciding whether to carry to term or terminate her pregnancy constitutes a government created obstacle in violation of *Roe v. Wade* and its progeny. The Secretary has gone beyond a mere refusal to fund and has interfered with the decisional process by dictating what information a woman may receive and by intruding into her relationship with her physician. This he may not do. We therefore enjoin the Secretary from enforcing or applying the counseling or referral provisions of the new regulations.

VII. FIRST AMENDMENT ANALYSIS OF THE RESTRICTIONS

The regulations before us forbid, as a condition of receiving funding, certain categories of speech, such as "counseling concerning the use of abortion," and "advocat[ing] abortion as a method of family planning." 42 C.F.R. §§ 59.8, 59.10. Appellees argue that the new regulations not only violate the

constitutional right to reproductive choice but also infringe upon the protections found in the first amendment, relying on *FCC v. League of Women Voters*, 468 U.S. 364 (1984). We agree.

The Supreme Court has made clear that "conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms." *Sherbert v. Verner*, 374 U.S. 398, 405 (1963). This doctrine is long standing:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech, . . . his exercise of those freedoms would in effect be penalized and inhibited.

Perry v. Sindermann, 408 U.S. 593, 597 (1972).

In determining whether the government may ever so condition a grant or benefit, the Court normally has applied a "strict scrutiny" test, and insisted that the government show a "compelling interest." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987) (striking down content-based sales tax exemption for magazines). *See also FCC v. League of Women Voters*, 468 U.S. 364 (1984).

In *FCC v. League of Women Voters*, the Court held that the government may not give federal funds to public radio and television stations upon the condition that the stations not engage in editorializing. The Court noted that the editorial ban was "defined solely on the basis of the content of the suppressed speech," it constituted a pure example of speech regulation "motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues," and the government could satisfy its asserted

interests (not using taxpayer money to promote views with which taxpayers may disagree or to promote government propaganda, and preventing the capture of stations by private interest groups) in "less restrictive" ways. *Id.* at 383-84.

For reasons that are similar, or even more compelling, the Title X regulations violate the first amendment. First, the need to protect the speech at issue here is even more important than public radio editorializing. The speech involves informing a woman about the existence of a health and privacy related activity in which she has a constitutional right to engage. Moreover, in context it is far less likely here than in the case of radio editorializing that a member of the relevant public will be adequately exposed to the relevant message content elsewhere. Given the educational and social handicaps of the women who depend upon Title X clinics, they may not learn much about the "pro/anti abortion" considerations elsewhere; and, in any event, they are likely to attach special importance to what a doctor tells them at a family planning clinic. At the same time, the regulations do not create "content-neutrality." Rather, they slant the content of the relevant counseling in an "antiabortion" direction; they insist that the doctors include on any list of "referrals" for prenatal, social service, or emergency medical services all "available providers who do not provide abortions," but they must exclude any provider "whose principal business is the provision of abortions." 42 C.F.R. § 59.8. *See Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 537-38 (1980) (first amendment is hostile to content-based regulation, and such regulation is approved only in certain narrow circumstances). In addition, the prohibited speech will often involve communications between a patient and doctor, an area (given the "life" and "liberty" interests potentially involved) warranting particularly strong protection. *Akron*, 462 U.S. at 445 (state must not put physician in a "straightjacket") *Thornburgh*, 476 U.S. at 762-63.

Second, the regulations impede the fund recipient from engaging in the protected activity no less than the statute the Court struck down in *League of Women Voters*, *supra*. The federal funds in *League of Women Voters* amounted to

about 25% of the total income for all public broadcasting stations. *Id.* at 390 n.19, 407. In this case they can be much less.[11] Moreover, the regulations require that any forbidden counseling activity must be "physically and financially separate" from any Title X project activity. These facts show that the regulations directly restrict the use of a significant amount of private money (the 10% or more that the private organizations spend within the Title X program). They also strongly suggest that family planning organizations typically mix their own funds with federal funds to build and to operate a single building or set of rooms, say, within a hospital. How then, without incurring impractically high, extra costs, could family planning clinic operators build separate rooms, entrances, or buildings solely for the purpose of taking a patient in the midst of family planning, moving her to a separate place, and counseling her about the availability of abortions? The practical effect of the regulations is to restrict significantly the ability of the recipient organization to engage in the forbidden counseling, even on its own time with its own money. At the least, it seems no easier here for a family planning organization to build its own private clinic to counsel abortion than for a federally funded public radio station to build its own separate, non-federally funded public radio station to editorialize. The government has said nothing that would make any contrary view plausible.

Third, the only "governmental interest" that the regulations seek to further is the government's interest in making certain its own money is not spent for a purpose outside the scope of its funded program.[12] But, the government could

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11 The federal funds in this case, by statute cannot amount to more than 90% of the funds available for a Title X family planning project; but the government, at oral argument, said that the federal government provides only about 50% of the money supporting federally funded family planning projects; and affidavits in the case show that some family planning organizations receive as little as 9% of their total operating budget from Title X.

12 We note that a report issued by the Comptroller General in 1982 found no evidence that Title X funds were used by any of the grantees to pro-

easily withdraw the "physically separate" facilities requirement, make the "counseling" regulations less slanted, and provide various forms of "bookkeeping" rules. These "less restrictive alternatives" would be as likely to prove effective here as in *League of Women Voters*. Regardless, the Supreme Court has frequently held that the government cannot prevent even its direct employees from exercising their First Amendment rights, even on the *government's time*. *See Rankin v. McPherson*, 483 U.S. 378 (1987) (state may not discharge employee for exercise of free speech during work hours). That the government cannot restrict privately financed, unusually important, speech activities simply to achieve an ironclad guarantee that its funds are not "improperly spent" would seem to follow *a fortiori*.

Fourth, in *League of Women Voters*, the Court found a violation of the First Amendment, even though it did *not* use a "strict scrutiny/compelling interest" standard. It did not use this standard in light of what it saw as an unusually strong government interest in regulating broadcasting. Here there is no such interest; to the contrary, privacy interests suggest an unusually strong interest in *not* regulating. Hence, there is no reason not to use the normal "strict scrutiny" tests; and the result here should therefore follow *a fortiori*.

The Secretary argues that the denial of funding for activities that "encourage, promote or advocate abortion as a method of family planning," section 59.10(a), reflects a legitimate decision, under the principles set forth in *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), to refuse to subsidize lobbying. *Regan* involved a challenge to a provision of the tax code that stated that contributions to nonprofit organizations engaging in lobbying would not be tax-deductible. The Court held the provision constitutional, stating that Congress has no obligation to fund advocacy activities. *Id.* at 546.

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vide abortions or to advise clients to have abortions. *See* Report by the Comptroller General of the United States (Sept. 24, 1982), *reprinted in* J.A. at 125, 127.

The regulations before us differ in a significant respect from those considered in *Regan*.[13] By prohibiting advocacy related to abortion, the regulations impose a restriction that is both viewpoint and content-based in violation of the first amendment. The *Regan* Court explicitly stated that its holding did not endorse funding decisions calculated to suppress specific ideas: "The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.' " *Regan*, 461 U.S. at 548 (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (quoting *Speiser v. Randall*, 357 U.S. 513, 519 (1958)). The Court further distinguished an unlawful attempt to suppress "dangerous ideas" from the clearly lawful decisions in *McRae* and *Maher* to fund certain activities differentially in accordance with a conception of the public interest. *Regan*, 461 U.S. at 549-50.[14]

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13 Had we not found that the physical and financial separation requirements imposed by section 59.9 violate Congress' intent to foster coordinated family planning services, *see supra* at 12-14, we would nevertheless be required to strike them down on constitutional grounds. The requirements impose a greater burden on Title X grantees than those considered by the Court in *Regan*. We illustrate briefly. Under the provisions of the Internal Revenue Code, an organization need show only separate incorporation and record keeping vis-a-vis its lobbying affiliate in order to qualify for tax deductible contributions. The Court found those requirements "not unduly burdensome." *Regan*, 461 U.S. at 544-45 n.6. But should §§ 59.9 and 59.10 be enforced as written, a Title X grantee would be subject to much more stringent regulation. Under section 59.9, the Secretary will consider not only the existence of separate bookkeeping, but also the separation of physical facilities and personnel, in determining whether a grantee is tainted by prohibited activities. On a practical level, this requirement is significantly more onerous than the purely paperwork requirements at issue in *Regan*.

14 Unlike this case, however, as the *Regan* Court noted, it was easy for the charities wishing to engage in lobbying to use separate incorporation and accounting methods simply to make certain that the "tax deductible" contributions did not pay for the lobbying activities. The HHS regulations here specifically forbid the Title X organization to do this. Moreover, the regulations here are not content neutral; and, as previously pointed out, the speech here is unusually significant. In any event, the Court, in *League of Women Voters*, distinguished the earlier case in *Regan*; and we must follow the later of the two.

The new regulations fall squarely on the unconstitutional side of the line drawn in *Regan*. Section 59.10 does not merely prohibit lobbying by a recipient organization; it prohibits *abortion-related* advocacy. The Court has held repeatedly that the government may not prohibit speech on the basis of "its message, its ideas, its subject matter, or its content." *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (citations omitted). Section 59.10 violates the prohibition by attempting to suppress pro-choice advocacy. The Secretary argues that the regulations are not viewpoint-based because they prohibit *all* advocacy concerning abortion, whether in support of or in opposition to the availability of abortion as a method of family planning. We find that argument factually untenable. The examples of prohibited activities listed in section 59.10(b), and reproduced in Appendix B, all concern actions that *promote* abortion; not one example concerns anti-abortion advocacy. But even were we to accept the Secretary's interpretation, the regulations would still fall as a content-based regulation: "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980). Through the medium of funding, the Secretary has attempted to limit public discussion on abortion rights. It is by now black letter law that such a restriction is a violation of the first amendment.

VIII. SEVERABILITY

In his dissent to the panel opinion, Judge Torruella argued that we should strike down the most pernicious aspects of the regulations[15] but leave the rest of the regulations intact, asserting that the offending portions are severable. His analysis of the offending sections was cogent and to the point.

15 He invalidates § 59.9 (physical separation); § 59.2 (definitions); and § 59.8 (2) (referral to pro-life services)

Much of his discussion of the innocuous or permissible aspects of the regulations assumed severability. Having carefully considered his arguments, we do not agree that the offending portions of regulations can be so easily detached. We find, as the Court found in *Thornburgh*, "the radical dissection necessary would leave [the statute] with little resemblance to that intended by the legislature." *Thornburgh*, 476 U.S. at 764; *see also Akron*, 462 U.S. at 445 n.37.

In examining severability a court must examine the functional independence of the valid and invalid provisions and the intent of the enacting legislature. *Keith Fulton & Sons v. New England Teamsters*, 762 F.2d 1124, 1136 (1st Cir. 1985). Judge Torruella would have struck the definition section that is the basis for the rest of the regulations. The regulations draw their power from the broad definition of a Title X program. Without the definition, none of the regulations are the same. Striking the definitional section of the regulations, but not the regulations themselves, eviscerates the guiding intent of the regulations and completely changes their meaning. This we cannot do.

All of the information before us leads us to believe that the Secretary intended that the regulations should be considered as a whole and that the Secretary would prefer that they be considered as a whole. There is no severability clause in the regulations creating a presumption of non-severability. *See e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936). In addition, the Secretary has never argued, as far as we can tell, that the regulations are severable. He certainly does not so argue in his brief. Severability was not argued below or before us in either case. Judge Torruella argued that severability is appropriate because if we strike the entire scheme of regulations "Title X programs [are given] free reign . . . to support or promote abortion as is deemed fit." But he ignored the fact that under the old regulations Title X programs could not promote abortion. *See also* Supp. Brief of NFPRHA 21 n.12 (discussing what they think would happen if we struck the regulation). Of course, in addition, all Title X programs would still be bound by the statutory prohibition found in § 1008. Based on our reasoning, and that of Judge

Torruella, certain of the regulations are unconstitutional. We find that the regulatory scheme is such that the offending regulations cannot be severed.

IX. CONCLUSION

For the reasons stated above, we enjoin the enforcement of the new regulations.

Affirmed.

Costs awarded to appellees.

APPENDIX A

The relevant provisions of the new regulations provide as follows:

§ 59.2 [Amended]

* * * * *

"Family planning" means the process of establishing objectives for the number and spacing of one's children and selecting the means by which those objectives may be achieved. . . . Family planning does not include pregnancy care (including obstetric or prenatal care). As required by section 1008 of the Act, abortion may not be included as a method of family planning in the Title X project. Family planning, as supported under this subpart, should reduce the incidence of abortion. . . .

"Title X" means Title X of the Act, 42 U.S.C. 300, *et seq.*

"Title X program" and "Title X project" are used interchangeably and mean the identified program which is approved by the Secretary for support under . . . the Act. . . . Title X project funds include all funds allocated to the Title X program, including but not limited to grant funds, grant-related income or matching funds.

§ 59.8 *Prohibiton on counselling and referral for abortion services; limitation of program services to family planning.*

(a)(1) a Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.

(2) Because Title X funds are intended only for family planning, once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child. She must also be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept. In cases in which emergency care is required, however, the Title X project shall be required only to refer the client immediately to an appropriate provider of emergency medical services.

(3) A Title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by "steering" clients to providers who offer abortion as a method of family planning.

(4) Nothing in this subpart shall be construed as prohibiting the provision of information to a project client which is medically necessary to assess the risks and benefits of different methods of contraception in the course of selecting a method; *provided*, that the provision of this information does not include counseling with respect

to or otherwise promote abortion as a method of family planning.

§ 59.9 *Maintenance of program integrity*

A Title X project must be organized so that it is physically and financially separate, as determined in accordance with the review established in this section, from activities which are prohibited under section 1008 of the Act and § 59.8 and § 59.10 of these regulations from inclusion in the Title X program. In order to be physically and financially separate, a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient. The Secretary will determine whether such objective integrity and independence exist based on a review of facts and circumstances. Factors relevant to this determination shall include (but are not limited to):

(a) The existence of separate accounting records;

(b) The degree of separation from facilities (*e.g.*, treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities;

(c) The existence of separate personnel;

(d) The extent to which signs and other forms of identification of the Title X project are present and signs and material promoting abortion are absent.

§ 59.10 *Prohibition on activities that encourage, promote or advocate abortion.*

(a) A Title X project may not encourage, promote or advocate abortion as a method of family planning. This requirement prohibits actions to assist women to obtain abortions or increase the availability or accessibility of abortion for family planning purposes. Prohibited actions include the use of Title X project funds for the following:

(1) Lobbying for the passage of legislation to increase in any way the availability of abortion as a method of family planning;

(2) Providing speakers to promote the use of abortion as a method of family planning;

(3) Paying dues to any group that as a significant part of its activities advocates abortion as a method of family planning;

(4) Using legal action to make abortion available in any way as a method of family planning; and

(5) Developing or disseminating materials (including printed matter and audiovisual materials) advocating abortion as a method of family planning.

APPENDIX B

Section 59.10(b) provides, in relevant part:

> 59.10 *Prohibition on activities that encourage, promote or advocate abortion.*
>
> . . . .
>
> (b) *Examples* (1) Clients at a Title X project are given brochures advertising an abortion clinic. Provision of the brochure violates subparagraph (a) of this section.
>
> (2) A Title X project makes an appointment for a pregnant client with an abortion clinic. The Title X project has violated paragraph (a) of this section.
>
> (3) A Title X project pays dues to a state association which, among other activities, lobbies at state and local levels for the passage of legislation to protect and expand the legal availability of abortion as a method of family planning. The association spends a significant amount of its annual budget on such activity. Payment

of dues to the association violates paragraph (a)(3) of this section.

(4) An organization conducts a number of activities, including operating a Title X project. The organization uses non-project funds to pay dues to an association which, among other activities, engages in lobbying to protect and expand the legal availability of abortion as a method of family planning. The association spends a significant amount of its annual budget on such activity. Payment of dues to the association by the organization does not violate paragraph (a)(3) of this section.

(5) An organization that operates a Title X project engages in lobbying to increase the legal availability of abortion as a method of family planning. The project itself engages in no such activities and the facilities and funds of the project are kept separate from prohibited activities. The project is not in violation of paragraph (a)(1) of this section.

(6) Employees of a Title X project write their legislative representatives in support of legislation seeking to expand the legal availability of abortion, using no project funds to do so. The Title X project has not violated paragraph (a)(1) of this section.

(7) On her own time and at her own expense, a Title X project employee speaks before a legislative body in support of abortion as a method of family planning. The Title X project has not violated paragraph (a) of this section.

CAMPBELL, *Chief Judge* (Concurring). I merely add, in joining in my brother's able opinion, that I find Judge Kearse's dissent in *New York v. Sullivan*, 889 F.2d 401, 415 (2d Cir. 1989) a particularly succinct and persuasive statement in support of the result we reach here. As the Supreme Court in *Roe v. Wade* ruled that a woman's right to an abortion was constitutionally protected, I do not see how the government, consistent with the First and Fourteenth Amendments, can deny funding to those who would give objective advice on this constitutionally protected alternative.

TORRUELLA, *Circuit Judge* (Dissenting). In the original panel decision of this case, I concurred in part and dissented in part, based on the assumption that the regulations at issue could be severed from the remainder of the legislation. Since that time, however, my views have been supplemented by the Supreme Court's decision in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), and by the Second Circuit's opinion regarding these rules in *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989). I am now convinced that these regulations, irrespective of whether or not they are subject to severance, do not interfere with any constitutional right protected pursuant to *Roe v. Wade*, 410 U.S. 113 (1973), or any First Amendment right as expressed in *F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984). In my opinion, the Secretary has merely refused to fund an activity which the government is not constitutionally required to support, without imposing legal obstacles to a citizen's choice of action in a protected area. *Webster, supra*; *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977). Nor have plaintiffs' First Amendment rights been inhibited in any constitutionally cognizable way. *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983); *Student Government v. Bd. of Trustees*, 868 F.2d 473 (1st Cir. 1989).

I believe that the challenged regulations are a valid exercise of executive power as authorized by Section 1008 of the Public Health Service Act, 42 U.S.C. § 300a-6. Consequently, I respectfully dissent.

Nos. 89-1391, 1392

MAY 4 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DR. IRVING RUST, on behalf of himself, his patients and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

THE STATE OF NEW YORK, THE CITY OF NEW YORK, THE NEW YORK CITY HEALTH & HOSPITALS CORP.,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE THE AMERICAN PUBLIC HEALTH ASSOCIATION, NOW LEGAL DEFENSE AND EDUCATION FUND, et al. IN SUPPORT OF THE PETITIONS

(LIST OF AMICI CONTINUE ON NEXT PAGE)

Of Counsel:

Nadine Taub
Rutgers University
School of Law
15 Washington Street
Newark, New Jersey 07102

Sarah E. Burns, Legal Director
NOW Legal Defense and
Education Fund
99 Hudson Street
12th Floor
New York, New York 10013

John H. Hall
Counsel of Record
Geoffrey H. Coll
Randi J. Roberts
Debevoise & Plimpton
875 Third Avenue
New York, New York 10022
(212) 909-6000

Attorneys for *Amici Curiae*

AMICI CURIAE

The American Association of University Women
American Ethical Union
American Humanist Association
American Jewish Committee
American Jewish Congress
American Medical Women's Association, Inc.
American Nurses' Association
Americans for Religious Liberty
Asian American Legal Defense and Education Fund
The Association of Reproductive Health Professionals
The Association for Women in Psychology
Boston Women's Health Book Collective
The California Coalition of Nurse Practitioners
Catholics for a Free Choice
Center for Population and Family Health, Columbia University
The Coalition of Labor Union Women
Comision Femenil Mexicana Nacional, Inc.
Connecticut Women's Education and Legal Fund, Inc.
The Coordinating Center for Women in Church and Society
Equal Rights Advocates, Inc.
Family Planning Advocates of New York State
Lambda Legal Defense & Education Fund, Inc.
The League of Women Voters of the United States
The Lymphoma Foundation of America
Madelyn Miller, CSW ACSW
NAACOG: The Organization for Obstetric, Gynecologic, and Neonatal Nurses
The National Abortion Rights Action League
The National Association of Nurse Practioners in Reproductive Health
The National Center for Lesbian Rights
The National Council of Jewish Women
The National Federation of Temple Sisterhoods—District 3
The National Law Center on Homelessness and Poverty
The National Lawyers Guild
The National Woman's Party
The National Women's Conference Committee
The National Women's Health Network
The National Women's Law Center
National Women's Political Caucus
New Jewish Agenda
New York State Republican Family Committee
Northwest Women's Law Center
Puerto Rican Legal Defense and Education Fund
Religious Coalition for Abortion Rights
Professor Deborah L. Rhode (Stanford Law School)
Professor Barbara Katz Rothman (Sociology Dept., Baruch College)
Sex Information and Education Council of the United States
The Southern California Women's Law Center
The Wisconsin Nurse Practitioners in Reproductive Health
Women's Equal Rights Legal Defense and Education Fund
The Women's Law Center, Inc.
The Women's Law Project
The Women's Legal Defense Fund
The YWCA of the U.S.A.

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INTEREST OF *AMICI CURIAE*

This brief is filed on behalf of 53 individuals and organizations, including associations of health care professionals dedicated to the advancement of public health across the United States and not-for-profit organizations committed to improving the health and circumstances of women. These organizations, which represent thousands of women and men, including patients, physicians and other health care professionals, have joined together to urge this Court to grant the writ sought by Petitioners Dr. Irving Rust, *et al.* (89-1391) and the State of New York, *et al.* (89-1392).

This case presents issues of critical national importance because implementation of the Title X regulations at issue will have a devastating impact throughout the country on the health of women seeking medical advice and care at family planning clinics receiving Title X funds. By censoring counseling and referrals regarding abortion, the regulations jeopardize not only the quality of health care provided at Title X-funded clinics but also their pregnant patients' constitutionally-protected right to decide, in consultation with a qualified physician, whether or not to terminate a pregnancy.

The American Public Health Association[1] and other *amici* organizations and individuals dedicated to the advancement of public health in the United States are particularly concerned that, by depriving women of necessary information and services and assaulting the integrity of the physician-patient relationship, the regulations will create a health crisis for women served by Title X family planning clinics.

NOW Legal Defense and Education Fund and other *amici* organizations and individuals committed to improving the condition of women are particularly concerned that the regulations unduly interfere with the fundamental right to reproductive choice essential to the health and lives of women

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1 The American Public Health Association is a plaintiff-appellee in *Massachusetts v. Secretary of Health and Human Services*, No. 88-1279, slip. op. (1st Cir. March 19, 1990).

using Title X-funded clinics. (Further statements of interest of *amici* are set forth at Appendix A.)

Amici have the consent of the parties to file this brief. Letters of consent have been filed separately in this Court.

SUMMARY OF ARGUMENT

This Court should grant the writ sought by Petitioners. The decision below raises issues of grave national importance because the regulations at issue jeopardize the health of women, interfere with the integrity of the physician-patient relationship and severely diminish the availability of quality health care for low-income women. In addition, the decision below conflicts with rulings of this Court that protect from undue governmental influence and distortion the physician-patient dialogue regarding a woman's decision to terminate her pregnancy.

Amici rely on the Statement of the Case set forth in the Petitions. *Amici* also support and will not reiterate the arguments set forth in the Petitions and Supplements to the Petitions for Writ of Certiorari regarding the separation requirement's impermissible burden on speech, the Secretary's lack of authority to promulgate the challenged regulations and the existence of conflict between the circuits.

The organizations of health care professionals and women that have joined together as *amici* are uniquely qualified to address the effect of the regulations on women served by Title X programs, doctors and other health care professionals who work in Title X programs, and the quality of care at family planning clinics that receive Title X funds. *Amici* submit this brief to focus this Court's attention on the uncontroverted evidence ignored by the Court of Appeals for the Second Circuit that demonstrates the severe harm the regulations will inflict on the communities served by Title X family planning clinics.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW RAISES ISSUES OF CRITICAL NATIONAL IMPORTANCE BECAUSE THE REGULATIONS AT ISSUE JEOPARDIZE THE HEALTH OF WOMEN, INTERFERE WITH THE INTEGRITY OF THE PHYSICIAN-PATIENT RELATIONSHIP AND SEVERELY DIMINISH THE AVAILABILITY OF QUALITY HEALTH CARE FOR LOW-INCOME WOMEN.

Title X is the primary source of federal support for family planning and reproductive health services, funding over 3,900 clinics nationwide and serving nearly five million low-income women per year.[2] Because section 59.8 of the regulations at issue in this case prohibits abortion counseling and referral and requires referral for prenatal care, the millions of low-income pregnant women served by Title X clinics will receive incomplete and biased medical advice. Section 59.8 forbids health care professionals in all these programs from informing their patients of the availability of abortion, and even from telling them where they can get abortion-related information. *See* 42 C.F.R. § 59.8(a)(1) (1989). Irrespective of the patient's medical condition, personal wishes and needs, the regulations absolutely prohibit professionals in Title X programs from providing any abortion counseling or referral. *See* 42 C.F.R. §§ 59.8(a)(4) (1989). Even when women request information about abortion, the clinic may only tell them that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." 42 C.F.R. § 59.8(b)(5) (1989).

At the same time that they require abortion-related information to be withheld, the regulations also compel Title X programs to provide a pregnant woman with a list of prenatal care providers "that promote the welfare of mother and

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2 Title X served 4.3 million low-income women in 1988. The Title X target population consists of an estimated 14.5 million women at risk of unintended pregnancy, including 5 million adolescents between the ages of 15 and 19. Note, *The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights?*, 41 Stan. L. Rev. 401, 408 (1989).

unborn child." 42 C.F.R. § 59.8(a)(2) (1989).[3] This referral list must include all prenatal care providers that do not perform abortions and it cannot include providers that offer abortion as their "principal business." 42 C.F.R. § 59.8(a)(3) (1989).

A. Section 59.8's Prohibition of Abortion Counseling and Referral Jeopardizes the Health of Women Served by Title X Clinics.

By mandating silence about abortion while simultaneously compelling referral for prenatal care, section 59.8 will lead many low-income pregnant women served by Title X programs to wrongly believe that abortion is not a safe, legal option. Even those women who discover that abortion is an available alternative will suffer delay and increased health risks. In particular, section 59.8 will jeopardize the health of pregnant women who have complicating physical conditions that make abortion a medically advisable alternative to child birth.

The most vulnerable women in our society will be directly affected by section 59.8's prohibition on abortion counseling. Approximately ninety percent of the women served by Title X programs have incomes below 150 percent of the poverty line, *Massachusetts v. Secretary of Health and Human Services*, No. 88-1279, slip op. at 6 (1st Cir. March 19, 1990) (citations omitted), and over thirty percent are teenagers. Affidavit of Dr. Melita Gesche, Director of the Bureau of Reproductive Health of the New York State Department of Health, ¶ 7 (545A, Ex. C-558A).[4] Low-income women and teenagers are least able to obtain adequate alternative health

3 The sole exception to this mandatory referral for prenatal care is when "emergency care is required." In such circumstances, a clinic is permitted to refer a patient to "an appropriate provider of emergency medical services." 42 C.F.R. § 59.8(a)(2) (1989). *See* discussion *infra*, n.14.

4 Citations to the appendix that accompanied the Petition of Dr. Irving Rust *et al.* and the Petition of the State of New York *et al.* are made to the page number therein as "(__a)." Citations to other materials in the record below will be to "(__A)" (referring to the joint appendix filed in the Second Circuit) or by name and date of document, if in the record but not included in either appendix.

care and bear the substantial economic burden of supporting and raising unwanted children. Moreover, the communities in which these women live suffer from disproportionately high rates of teenage pregnancy and epidemic health problems, such as AIDS, which increase the risks associated with pregnancy. Declaration of Dr. George Morley, President of the American College of Obstetricians and Gynecologists, ¶ 8, 10, 16 (661A-63A); Declaration of Prof. Howard Minkoff, Professor of Obstetrics and Gynecology, State of New York Health Science Center, ¶ 5 (647A).

Section 59.8's requirement that biased and incomplete information be presented to the low-income women served by Title X programs creates a substantial obstacle to their decision whether or not to terminate a pregnancy. It takes little imagination to understand how intimidation, concern for imposing on the physician's time, fear of offending him or her, or a lack of knowledge necessary even to begin to question their doctor's advice can keep Title X patients from asking about abortion. *See* Katz, *Physician-Patient Encounters "On a Darkling Plain,"* 9 W. New Eng. L. Rev. 207, 222 (1987). Since those Title X patients who do ask about the availability of abortion may be told only that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion," even they may believe—at least for a critical time period—that abortion is not appropriate for them or that they have no safe alternative to carrying their pregnancy to term. Declaration of Dr. Irving Rust, Medical Director of the Bronx Center of Planned Parenthood, New York City, ¶ 15 (92a). Believing they have no other alternatives, pregnant patients may even turn to life-threatening "home remedies" such as hazardous chemical douches or falling down stairs to avoid having unwanted children. Declaration of Dr. Irving Rust ¶¶ 11 (92a), 14-16 (704A-705A). For all women, section 59.8 interferes with their ability to decide between abortion and childbirth by depriving them of counseling essential to an informed choice.

Teenagers are especially vulnerable to the misleading message of the regulations. They are often scared, intimidated and alone when faced with pregnancy. Presented with the biased and misleading advice mandated by the regulations, an adolescent patient may well feel betrayed and uncared for by her physician, the very person she thought she could trust in her time of need. Declaration of Marilyn Bennett, Executive Director of Health Services, Hudson County, New Jersey, ¶¶ 19-22 (500A-501A); Affidavit of Dr. Richard Narkewicz, President of the American Academy of Pediatrics, ¶ 4 (February 2, 1988).[5] The regulations will undermine teenagers' confidence in Title X clinics and discourage many teenagers from ever returning for family planning services. Affidavit of Dr. Richard Narkewicz ¶ 4(c) (February 2, 1988).

By giving women inappropriate referrals to prenatal care providers, the regulations will also delay those women who are ultimately able to obtain abortions. Declaration of Dr. Stanley Henshaw, Deputy Director of Research, Alan Guttmacher Institute, ¶¶ 12, 15, 21 (600A-604A). Section 59.8 will require women to pursue referral after referral until they locate a doctor willing to perform abortions.[6] Misleading information is particularly problematic for the low-income women served by Title X programs who often lack access to a car or even a telephone and live in rural areas miles from the nearest family planning center. Declaration of Francine

5 Recognizing the importance of counseling to adolescents with unwanted pregnancies, physicians have adopted more detailed and stringent ethical standards for their relationships with adolescents. *See* American College of Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services* 22 (6th ed. 1985) ("[R]ecommendations should be specifically directed toward [the pregnant adolescents'] needs. Sensitivity, perceptive and in-depth discussions with the patient and those supporting her may be necessary."); American Academy of Pediatrics, Committee on Adolescence, *Counseling the Adolescent About Pregnancy Options*, 83 Pediatrics 135, 136 (Jan. 1989) ("A warm and accepting environment in which the adolescent feels sufficiently secure to explore her own feelings about pregnancy and its consequences is essential.").

6 The difficulty in locating an alternative provider of abortions is increasing as fewer doctors are willing to perform abortions for fear of harassment. N.Y. Times, Jan. 8, 1990 at A1, col. 1. It is not uncommon in many parts of the country for women to travel hundreds of miles to obtain an abortion. *Id.*

Stein, Executor Director of Planned Parenthood of Westchester and Rockland Counties, New York, ¶ 10 (February 4, 1988).

Delay can push patients into the second trimester of pregnancy, making an abortion more risky, costly and difficult to obtain. Declaration of Dr. George Morley ¶ 12 (79a).[7] Delay is particularly harmful to pregnant adolescents, whose fear and uncertainty often result in a late initial visit to the clinic. *Id.* at ¶ 12 (79a).

The regulations will have perhaps their cruelest effect on those low-income pregnant women who have serious complicating conditions, such as hypertension,[8] eclampsia[9], diabetes,[10] congenital heart disease,[11] cancer,[12] sickle-cell ane-

7 Serious health risks go hand-in-hand with any delay. The mortality risk for abortion increases by 50% each week after the eighth week of pregnancy and the risk of major complications increases by approximately 30% each week after the eighth week. Declaration of Dr. George Morley ¶¶ 12-13 (79a).

8 Hypertension complicates about eight to ten percent of pregnancies. *Clinical Obstetrics* 645 (C. Pauerstein ed. 1987). It may either be induced or aggravated by the pregnancy. While the hypertension can be controlled in the majority of cases, hypertensive pregnant women are at higher risk for cerebrovascular accidents (strokes), abruptio placentae (premature separation of the placenta from the uterus), and disseminated intravascular coagulation (a severe bleeding disorder). *Id.* at 655-56; *Maternal-Fetal Medicine* 801 (R. Creasey & R. Resnik 2d ed. 1989). *See* Declaration of Dr. Allan Rosenfield, Professor of Obstetrics-Gynecology and Public Health, Columbia University School of Public Health, ¶¶ 10-11 (681A-683A).

9 A severe form of pregnancy-induced hypertension called eclampsia complicates about one tenth of one percent (0.1%) of deliveries. *Williams Obstetrics* 539 (J. Pritchard, P. MacDonald & N. Grant 17th ed. 1985). Eclampsia is characterized by headaches, visual disturbances, abdominal pain and seizures, and has a maternal mortality rate of up to 17% depending upon the adequacy of prenatal care and access to health care facilities. *Clinical Obstetrics*, *supra* note 8, at 647.

10 Pregnancy-induced diabetes occurs in approximately one to three percent of pregnancies. *Medical Complications During Pregnancy* 41 (G. Burrow & T. Ferris 3d ed. 1988). In addition, approximately 1.5 million women of childbearing age are known to have diabetes. *Maternal-Fetal Medicine*, *supra* note 8, at 925. A pregnant woman with diabetes is four times as likely to develop hypertensive disease; she is also more likely to develop infections of a greater severity, injure her birth canal during vaginal delivery, require a caesarian section, and hemorrhage after delivery.

(*Footnotes 11 and 12 appear on next page*)

mia,[13] kidney disease and certain respiratory, urinary and neuromuscular disorders. Pregnancy greatly increases the long-term risks associated with each of these diseases, even when not necessarily generating an immediate health emergency.[14]

Because pregnancy can also accelerate the course of AIDS (Acquired Immune Deficiency Syndrome), abortions can prolong the lives of pregnant women suffering from AIDS. Declaration of Prof. Howard Minkoff ¶ 7 (647A-648A).[15] Moreover, pregnant women suffering from AIDS should be counseled about abortion in the context of the risk that their

Williams Obstetrics, *supra* note 9, at 600. *See* Declaration of Dr. Irving Rust ¶ 17 (705A-706A).

11 There is a 50% possibility that the additional stress of pregnancy will kill women with severe malformations of the heart caused by congenital heart disease. *Obstetrics & Gynecology* 231 (D. Danforth & J. Scott 5th ed. 1986). Pregnant women with heart disease are at greater risk of congestive heart failure, cardiac infections and arrhythmias (abnormal heart rhythms). *Id.* at 492-97; *Maternal-Fetal Medicine*, *supra* note 8, at 749-58.

12 Cancer is the second leading cause of death among women in their reproductive years; it can threaten the fetus as well as the woman. Williams & Britan, *Cancer and Pregnancy*, 12 Clin. Perinatology. 609 (1985). The chemotherapy or radiation that may be necessary to preserve the life or health of a woman with cancer is likely to result in fetal malformation or death.

13 Pregnant women with sickle-cell anemia experience more frequent and severe crises, especially in bones, and are more susceptible to pneumonia and urinary tract infections, increasingly severe anemia, congestive heart failure, pre-eclampsia, and pulmonary complications such as embolus. Declaration of Dr. Allan Rosenfield ¶ 14 (684A); *see also* Fort, Morrison, Berreras, Diggs and Fish, *Counseling the Patient With Sickle Cell Disease About Reproduction: Pregnancy Outcome Does Not Justify the Maternal Risk*, 111 Am. J. of Obstetrics and Gynecology 324 (Sept.-Dec. 1971).

14 Hypertension, pre-eclampsia, diabetes, congenital heart disease or cancer when discovered in conjunction with pregnancy do not constitute an "emergency" under the regulations, requiring referral to the emergency room of a nearby hospital. Declaration of Dr. Irving Rust ¶ 17 (92a-93a); Declaration of Dr. Allan Rosenfield ¶¶ 21-22 (687A-689A). The emergency exception is far too subjective and narrow to prevent the harm caused by the regulations' prohibition on abortion counseling and referral.

15 *See* Minkoff, *Care of Pregnant Women Infected With Human Immunodeficiency Virus*, 258 J. of Am. Med. Ass'n 2714 (1987).

newborn babies will be HIV-infected.[16] Similarly, a pregnant woman infected with a disease such as rubella, herpes, or syphilis that could have a devastating effect on her fetus should also be counseled about her options.[17] Even in these circumstances, the regulations prevent a woman from being counseled about the option of abortion.

While professionals in Title X clinics are permitted to disclose the existence of AIDS or other complicating conditions to their patients, they may not discuss abortion as an alternative to carrying the pregnancy to term. Declaration of Dr. George Morley ¶ 17 (664A); Declaration of Prof. Howard Minkoff ¶ 8 (648A); Declaration of Dr. Allan Rosenfield ¶¶ 21-22 (687A-689A). As a result, women with serious complicating conditions are prevented from learning that their pregnancy poses substantial health risks that may require an abortion to save their life or preserve their health. Section 59.8's mandated referral to prenatal care may also reinforce the false impression that the pregnancy does not threaten their health or the health of the fetus.

The regulations create obstacles which prevent women served by Title X programs from freely choosing between abortion and childbirth. Left unreviewed by this Court, the decision below will have a devastating impact on the health of these low-income pregnant women, including those with life-threatening medical complications. *Amici* respectfully ask this Court to grant the writ sought by petitioners, rather than turn its back on the myriad dangers which threaten the health and well-being of pregnant women.

16 Thirty to fifty percent of the babies whose mothers are HIV-infected will also develop AIDS. Exhibit F to Affidavit of Dr. Melita Gesche (New York State Department of Health, *Newborn Seroprevalence Study* (1988)) (563A).

17 For example, a fetus exposed to a rubella infection during the first four weeks of gestation has a 61% chance of developing congenital defects, including ocular and cardio-vascular anomalies, mental retardation, and early onset diabetes. *Genetics in Obstetrics and Gynecology* 229-30 (Simpson ed. 1982).

B. Section 59.8 of the Regulations Interferes with the Integrity of the Physician-Patient Relationship by Forcing Physicians to Depart from Their Professional Code of Ethics, Preventing Them from Exercising Their Best Judgment and Exposing Them to Liability for Malpractice.

This case raises the important question of whether the federal government, through funding restrictions on speech and information about abortion, can legitimately compel health care professionals practicing in Title X clinics to violate their ethical standards and ignore individual patients' needs. In *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 431 (1983), this Court declared that the government's discretion to regulate abortions does not permit it to adopt regulations "that depart from accepted medical practice." In the face of this admonition, section 59.8 requires Title X practitioners to violate their professional code of ethics, prevents them from exercising their best medical judgment and exposes them to liability for malpractice.

Under principles of medical ethics and the law of informed consent, a physician is obliged to render care in a manner respectful of his or her patient's right to self-determination. The physician must disclose sufficient information regarding the patient's condition and treatment alternatives to permit the patient to make an informed decision about appropriate treatment and to know where it can be obtained.[18] Nowhere is this more important than when the patient is a pregnant woman facing a medical decision with dramatic and irreversible life consequences. *See Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986) ("few decisions are . . . more basic to individual dignity and autonomy" than a woman's reproductive choice). The pregnant woman's physician plays a central role in her decision-making process by providing her with the crucial medical facts relevant to her decision whether to terminate her pregnancy. By prohibiting physicians and other health care work-

18 *See, e.g.*, American Medical Association, *Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association* ¶ 8.07, at 31-32 (1989) [hereinafter *AMA Opinions*]; *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

ers in Title X clinics from giving a pregnant patient complete medical information regarding childbirth and abortion, section 59.8 denies that patient the opportunity to intelligently make the personal and self-defining decision of whether or not to carry a pregnancy to term.[19]

Section 59.8 thus compels Title X physicians to breach their code of ethics in *every* case of pregnancy, even if no complicating condition exists. Contrary to professional standards that require balanced counseling and discussion of the full range of options to which a woman is entitled when pregnancy is diagnosed, the regulations require Title X health care providers to direct their counseling solely towards preventing abortion and promoting childbirth.[20]

The regulations prevent Title X physicians from properly caring for their patients whenever a woman is undecided and particularly when a pregnancy is unwanted.[21] Section 59.8's

19 When divorced from the abortion controversy, a physician's breach of ethics for failure to communicate complete, unbiased information essential to a medical decision becomes immediately apparent. Imagine if the government were to decree that oncologists working in federally-funded clinics could not mention chemotherapy as a treatment alternative to cancer patients.

20 The American College of Obstetricians and Gynecologists standard of care establishes that:

> Counseling directed solely toward either promoting or preventing abortion does not sufficiently reflect the full nature of the problem or range of options to which the patient is entitled. Appropriately balanced counseling, combined with available and accessible facilities, provide the *minimum* base for the opportunity to make a truly informed choice.

American College of Obstetricians and Gynecologists, *Statement of Policy: Further Ethical Considerations in Induced Abortion* (Dec. 1977) (emphasis added). *See also AMA Opinions*, *supra* note 18, ¶ 8.07, at 31-32 (1989); Affidavit of Dr. James H. Sammons, Executive Vice President of the American Medical Association ¶ 3 (80a-81a). These ethical obligations apply regardless of the physicians' source of income or payment.

21 Professional standards provide that "[i]n the event of an unwanted pregnancy, the physician should counsel the patient about her options of continuing the pregnancy to term and keeping the infant, continuing the pregnancy to term and offering the infant for legal adoption, or aborting the pregnancy." American College of Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services* 57 (6th ed. 1985).

compelled disclosure of information intended to promote the health of the "mother" and "unborn child" and referrals of women with unwanted pregnancies to prenatal care providers interfere with physicians' ethical responsibility to respect the dignity of these patients.[22] Even if a patient requests abortion information, her physician must mechanically recite the Secretary's prescribed response: "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." 42 C.F.R. § 59.8(b)(5) (1988). The regulations thus compel physicians to insult their pregnant patients' dignity by forcing these women to listen to irrelevant and at times painful information and by depriving them of information necessary to make and effectuate an informed decision.

By forcing Title X physicians to ignore their pregnant patient's need for information necessary to her decision and subsequent care—a patient the physician knows may have no affordable and safe health care alternative—the regulations require physicians to disregard their most fundamental ethical obligation: not to neglect a patient.[23] Whether or not physicians favor or perform abortions themselves, they are obligated to refer a patient who chooses to terminate her pregnancy to a competent physician who will be responsive to her medical and psychological needs.[24] Because any delay can be dangerous, a frank discussion of medical risks and alternatives becomes most critical to the continued health of the patient when a physician terminates his care and provides a

22 American Medical Association, *Principles of Medical Ethics*, in *AMA Opinions*, *supra* note 18 at ix ("A physician shall be dedicated to providing competent medical service with compassion and respect for human dignity.").

23 *AMA Opinions*, *supra* note 18, ¶ 8.10, at 33 ("Once having undertaken a case, the physician should not neglect the patient . . . ."); Declaration of Dr. Jay Katz, Professor of Law and Psychoanalysis, Yale University, ¶ 6 (83a-84a).

24 *See AMA Opinions*, *supra* note 18, ¶ 3.04 at 14; President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions: A Report on the Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship*, vol. 1 at 76 (1982) [hereinafter *President's Commission*].

referral. The regulations forbid Title X practitioners from fulfilling this obligation and facilitating their patients' constitutionally-protected reproductive choice.

Compliance with section 59.8 will not only result in ethical violations but it will also prevent physicians in many situations from exercising and acting in accordance with their best medical judgment. The regulation precludes physicians from providing necessary counseling to a woman whose pregnancy will exacerbate an existing complicating condition. Moreover, physicians must provide even the patient for whom abortion is medically indicated with an undifferentiated list of prenatal care providers, some of which may perform abortions but none "whose principal business is the provision of abortions." 42 C.F.R. § 59.8(a)(3) (1989).[25]

Consequently, by requiring physicians to withhold even medically advisable information and provide inappropriate referrals, section 59.8 will expose Title X physicians to liability for medical malpractice and violations of informed consent for any resulting harm to their pregnant patients.[26] Physicians have been found liable for failing to inform parents at risk of giving birth to a child with genetic or other abnormalities of prenatal diagnostic tests and the option of abortion.[27] Physicians who fail to refer immediately a woman

25 Because 70% of all abortions are performed by providers whose "principal business" is abortions, the regulations will obstruct access to the majority of providers, particularly the most proficient and experienced. Declaration of Dr. Stanley Henshaw, Deputy Director of Research for the Alan Guttmacher Institute, New York City, ¶ 12 (600A).

26 Under the doctrine of informed consent, embodied in state tort law nationwide, a physician may be liable for failure to inform patients of all alternative treatment options, failure to provide adequate information regarding health risks (including the risk of not undergoing a certain medical procedure), and failure to provide appropriate referrals. *See President's Commission*, *supra* note 24, Appendix L at 193; Andrews, *Informed Consent Statutes and the Decisionmaking Process*, 5 J. of Legal Medicine 163 (1984).

27 *See, e.g., Robak v. United States*, 658 F.2d 471 (7th Cir. 1981) (failure to diagnose rubella and inform parents of risk to fetus); *Phillips v. United States*, 508 F. Supp. 544 (D.S.C. 1981) (failure to advise, counsel and test for risk of Down's Syndrome); *Goldberg v. Ruskin*, 128 Ill. App. 3d

for whom abortion is medically indicated to an appropriate provider may be liable for the harm and increased risk of a delayed termination of her pregnancy.[28]

Left unreviewed by this Court, the decision below will place practitioners at Title X clinics in an untenable position. Physicians will either have to comply with the regulations and thereby depart from accepted standards of medical practice or leave Title X clinics. The regulations will force those doctors who continue to serve poor women in Title X facilities to severely compromise the quality of their care. *Amici* respectfully request that the Court grant the writ sought by Petitioners to preserve the integrity of the physician-patient relationship and prevent the regulations from denigrating the medical profession and undermining the quality of family planning services provided to low-income women.

C. The Regulations Will Engender a Two-Tiered System of Health Care by Severely Diminishing the Availability of Quality Family Planning Services for Low-Income Women.

If implemented, the regulations will exacerbate the already critical shortage of quality health care in low-income communities. Local family planning clinics offering comprehen-

1029, 471 N.E.2d 530 (Ill. App. Ct. 1984), *aff'd*, 113 Ill. 2d 482, 499 N.E.2d 406 (Ill. 1986) (failure to advise parents of tests designed to detect Tay Sachs disease); *Smith v. Cote*, 128 N.H. 231, 513 A.2d 341 (N.H. 1986) (failure to timely diagnose rubella and inform parents of consequences); *Berman v. Allen*, 80 N.J. 421, 404 A.2d 8 (N.J. 1979) (failure to inform parents of the availability of amniocentesis to detect Down's Syndrome); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807 (N.Y. 1978) (same). *See generally* S. Elias & G.J. Annas, *Reproductive Genetics and the Law* 109-10 (1977).

28 *See, e.g., Steele v. United States*, 463 F. Supp. 321, 330 (D. Alaska 1978) (failure to refer patient to qualified medical practitioner that results in delay in treatment is breach of standard of care); *Lindquist v. Dengel*, 92 Wash. 2d 257, 263, 595 P.2d 934, 937 (Wash. 1979) ("To delay a referral [to a specialist when diagnosis indicates such expert treatment is required] could itself be a breach of the general practitioner's duty."); *Manion v. Tweedy*, 257 Minn. 59, 65, 100 N.W.2d 124, 128 (Minn. 1959) (if physician knows or should know that a patient's condition is beyond his knowledge, ability or capacity to treat, he must advise the patient of necessity of other treatment).

sive health care, funded to a significant degree by Title X, play a vitally important role in low-income communities. *See* Forrest, *The Delivery of Family Planning Services in the United States*, 20 Fam. Plan. Persp. 91 (1988). Apart from Title X-funded facilities, many women and adolescents have no other health care providers or sources of information about reproductive and general health care. *See e.g.*, Affidavit of Dr. Stephen Joseph, Commissioner of Health for City of New York, ¶ 8 (611A); Declaration of P. Roe ¶¶ 5, 7 (96a); Declaration of M. Roe ¶ 6 (696A); Declaration of L. Roe ¶¶ 4, 7 (97a).[29]

The regulations endanger the very existence of Title X-funded clinics in two ways. First, the regulations will severely impair the clinics' ability to hire and retain competent health care professionals by threatening them with censure, loss of license or legal liability for malpractice. As a result, Title X programs will be paralyzed by attrition and face the difficult task of attempting to find suitable replacements. Declaration of Dr. Jay Katz ¶ 18 (634A); Declaration of Lorraine Tiezzi ¶ 8(c) (728A).

Second, the regulations' requirement that Title X-funded clinics be physically and financially separate from any activity relating to abortion, 42 C.F.R. § 59.9, seriously threatens their ability to provide comprehensive reproductive care and, indeed, remain in operation at all. The measures contemplated by the separation requirement, which include the maintenance of separate physical facilities and separate personnel, "will in many cases be prohibitively expensive and

29 Even HHS has acknowledged that "[f]or many patients, family planning clinics are their *only* source of health information or medical care." United States Department of Health and Human Services, *Program Guidelines for Project Grants for Family Planning Services* § 9.4 (1981) (39A) (emphasis added). Recipients of Title X funds routinely provide non-reproductive medical services to both men and women. Medical services for women include diagnosis and treatment of sexually transmitted diseases, HIV testing, screening tests for cervical cancer, breast examinations and self-breast examination instruction. Medical services for men include vasectomies and post-surgical follow-up examinations, primary urological examinations, diagnosis and treatment of venereal disease and other sexually transmitted infections, and HIV testing. Affidavit of Ruth Klepper, Executive Director of Upper Hudson Planned Parenthood ¶¶ 8-11 (February 5, 1988).

operationally untenable." Declaration of Raymond Fink, Chairperson of the Medical and Health Research Association of New York City, Inc., ¶ 13(a) (539A).

The regulations' attack on the Title X program will reinforce the dual system of health care that already exists in the United States. Declaration of Raymond Fink ¶ 12(a) (536A). Women of means, unaffected by the regulations, will continue to have access to sound health care from private practitioners. In contrast, low-income women and adolescents will have difficulty locating any family planning services or general health care at all. Even if they are able to find a family planning program, they will receive incomplete and biased information from doctors compelled to disseminate the government's anti-abortion message at clinics which cannot provide sound comprehensive reproductive health care. If left unreviewed, the practical effect of the decision below will be to endanger the health of Title X clients by diminishing the availability of comprehensive quality family planning services in communities already facing a critical shortage of health care.

II. THE DECISION BELOW CONTRAVENES RULINGS OF THIS COURT THAT PROTECT THE PHYSICIAN-PATIENT DIALOGUE REGARDING A WOMAN'S DECISION TO TERMINATE HER PREGNANCY.

This Court should grant the writ sought by Petitioners because the decision below is contrary to precedent that guarantees privacy and First Amendment protection to the physician-patient dialogue regarding a woman's decision to terminate her pregnancy. As demonstrated above, and as the First Circuit recognizes, the regulations pose a significant obstacle to a woman's decision to terminate her pregnancy by precluding her from obtaining from her physician the very information she needs to make her constitutionally-protected reproductive choice. *See Massachusetts v. Secretary of Health and Human Services*, slip. op. at 30. Nevertheless, the Second Circuit, relying on *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), *Harris v. McRae*, 448 U.S. 297, *reh'g denied*, 448 U.S. 917 (1980) and *Maher v. Roe*, 432 U.S. 464 (1977), held that the regulations merely implement a legitimate funding decision to support childbirth over abortion. *See New York v. Sullivan*, 889 F.2d 401, 411 (2d Cir. 1989).

In resolving this clear conflict between the circuits, the Court must be mindful of its previous rulings. This Court has consistently held that the government cannot obstruct fundamental procreative choice by placing a "governmental obstacle in the path of a woman who chooses to terminate her pregnancy." *Webster*, 109 S. Ct. at 3052 (quoting *McRae*, 448 U.S. at 315). It is equally well-established that the government may not impose such obstacles through public-funding restrictions any more than it can through other means. *See Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981) (conditions on public benefits that inhibit or deter constitutionally-protected rights are unconstitutional); *Perry v. Sinderman*, 408 U.S. 593, 597 (1972); *Sherbert v. Verner*, 374 U.S. 398, 405 (1963); *Speiser v. Randall*, 357 U.S. 513, 518-19, *reh'g denied*, 358 U.S. 860 (1958).

To protect the right at the heart of *Roe v. Wade*, 410 U.S. 113, *reh'g denied*, 410 U.S. 959 (1973)—the right to be free from unwarranted governmental interference in *the process of deciding* whether or not to bear a child—this Court has repeatedly shielded the decisionmaking process from undue governmental influence and distortion. In *City of Akron v. Akron Center for Reproductive Health Inc.*, 462 U.S. 416 (1983), this Court struck down a law requiring physicians to furnish a pregnant woman contemplating abortion with certain information about the surgical procedure and the physiological characteristics of the fetus, some of which was misleading. Akron's ordinance "unreasonably . . . placed 'obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision.' " *Id.* at 444-445 (quoting *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977)). This Court reasoned that "full vindication of the woman's fundamental right necessarily requires that her physician be given 'the room he needs to make his best medical judgment.' " *Id.* at 427 (quoting *Doe v. Bolton*,

410 U.S. 179, 192 (1973)). That room required preserving the discretion of a pregnant woman's physician to provide his or her patient with information relevant to her particular needs. *Id.* at 443. The government's attempt to structure the informed consent dialogue was impermissible precisely because it was "designed to influence the woman's informed choice between abortion and childbirth." *Id.* at 444.

In *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), this Court reaffirmed the principle that physicians may not be compelled to convey a distorted message to their patients by withholding essential, or providing unnecessary or misleading, medical information designed to influence their patients' right to reproductive choice. It therefore invalidated a state statute requiring a physician to provide a woman with a description of fetal development and a list of agencies offering alternatives to abortion. In doing so, this Court found the requirement to be "nothing less than an outright attempt to wedge the [government's] message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician." *Thornburgh*, 476 U.S. at 762.

By dictating the precise content of the physician-patient dialogue, the Title X regulations at issue place an even more constricting "strait jacket" on a Title X physician's relationship with patients and erect an even more imposing obstacle to a woman's choice than did the statute at issue in *Thornburgh*. Not only do the regulations forbid Title X practitioners from counseling women about abortion and providing appropriate referrals to women who choose it, but they also demand that physicians furnish *all* patients with information and a list of available providers that promote the health of "the mother and unborn child." 42 C.F.R. § 59.8(a)(2) (1989). The regulations thus compel physicians to provide biased information and referrals that will be completely unresponsive to the needs and requests of their individual patients. As discussed in Section I(A), the regulations will lead some women to believe that abortion is either unavailable or inappropriate. For others, the provision of misleading referrals will delay and perhaps even prevent a woman from obtaining the procedure. Thus, unlike the provisions in

Maher and *McRae*, the regulations "create[ ] a new and imposing obstacle to abortion." *Massachusetts v. Secretary of Health and Human Services*, slip op. at 43.

Through the medium of funding, the government is attempting to suppress speech about abortion and to turn Title X practitioners into spokespersons for the government's anti-abortion message, in violation of not only the constitutional right to reproductive choice but also First Amendment principles. In the words of Justice Douglas, "[t]he right of the doctor to advise his patients according to his best lights seems so obviously within First Amendment rights as to need no extended discussion." *Poe v. Ullman*, 367 U.S. 497, 513, *reh'g denied*, 368 U.S. 869 (1961) (Douglas, J., dissenting from a dismissal on technical grounds). By obstructing the free flow of vital medical information between doctor and patient, the regulations impermissibly censor speech essential to both the sound practice of medicine and a woman's constitutionally protected right to decide whether to terminate a pregnancy.

Moreover, by simultaneously compelling advice regarding prenatal care and prohibiting speech about abortion, sections 59.8 and 59.10[30] discriminate on the basis of viewpoint. They thus flout this Court's repeated warning that the government may not "discriminate invidiously in its subsidies in such a way as to ai[m] at the suppression of dangerous ideas." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 548 (1983) (*quoting Cammarano v. United States*, 358 U.S. 498, 513 (1959)); *see also Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 811-13 (1985). The suppressive nature of the regulations will be uniquely powerful because they target a dependent and vulnerable population for whom there are limited, if any, alternative sources of abortion information.

Left unreviewed by this Court, the decision below will permit the federal government to restructure the physician-patient dialogue in Title X-funded clinics in a manner

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30 Section 59.10 prohibits the use of Title X funds for activities that "encourage, promote or advocate abortion," including lobbying, legal action and disseminating materials. 42 C.F.R. § 59.10(a) (1989).

intended to mislead and intimidate women into relinquishing their constitutionally protected reproductive choice and continuing an unwanted, at times dangerous, pregnancy to term. *Amici* respectfully urge this Court to review and condemn, as it has in the past, this "effort to deter a woman from making a decision that, with her physician, is hers to make." *Massachusetts v. Secretary of Health and Human Services*, slip op. at 34 (quoting *Thornburgh*, 476 U.S. at 759).

CONCLUSION

For all the foregoing reasons, this Court should grant the writ of certiorari sought by petitioners.

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Respectfully submitted,

John H. Hall
Counsel of Record
Geoffrey H. Coll
Randi J. Roberts
Debevoise & Plimpton
875 Third Avenue
New York, New York 10022
(212) 909-6000

Attorneys for *Amici Curiae*

Of Counsel:

Nadine Taub
Rutgers University School of Law
15 Washington Street
Newark, New Jersey 07102

Sarah E. Burns, Legal Director
NOW Legal Defense and Education Fund
99 Hudson Street
12th Floor
New York, New York 10013

APPENDIX A

INTEREST OF *AMICI CURIAE* ORGANIZATIONS

The AMERICAN ASSOCIATION OF UNIVERSITY WOMEN ("AAUW"), a nationwide network of 140,000 college-educated women, promotes equity for women and girls, education and self-development over the life span, and positive social change. The AAUW supports the right of every woman and girl to safe and comprehensive reproductive health care and to be informed of all available reproductive health care options. AAUW believes that decisions concerning reproductive health care are personal ones and that the right to make informed decisions should be available to all women.

AMERICAN ETHICAL UNION is a humanistic religious and educational movement inspired by the ideal that the supreme aim of human life is working to create a more humane society. The Ethical Movement was founded in 1876 in New York City. At present there are approximately 4,000 members nationwide belonging to the Ethical Movement.

AMERICAN HUMANIST ASSOCIATION ("AHA") is an educational and philosophical-religious organization founded in 1941. The association and its members oppose interference with the right of medical professionals to provide information to clients and the right of clients to receive uncensored counseling from medical professionals in tax-funded programs. The Association and its members oppose, as Establishment Clause violations, government regulations which have the effect of imposing sectarian religious values in tax-funded programs.

The AMERICAN JEWISH COMMITTEE ("AJC") is a national organization of 40,000 members, founded in 1906 for the purpose of protecting the civil and religious rights of Jews. The AJC believes that this goal can best be accomplished by helping to preserve the constitutional rights of all Americans, including the fundamental right of access to abortion on a voluntary basis.

The AMERICAN JEWISH CONGRESS is an organization of American Jews founded in 1918 to protect the civil, political and religious rights of American Jews and all Americans. For three decades it has vigorously supported reproductive choice, beginning with a 1958 AJC-led campaign to allow municipal hospitals in New York City to dispense contraceptive devices and advice to patients.

AMERICAN MEDICAL WOMEN'S ASSOCIATION ("AMWA") is a nonprofit organization of 12,000 women physicians and medical students. One of AMWA's primary missions is to promote quality health care for women. AMWA strongly opposes laws which adversely affect the health of women or impose constraints on the right of the pregnant patient, in consultation with her physician, to make a personal and medically informed decision whether or not to continue a pregnancy.

The AMERICAN NURSES' ASSOCIATION ("ANA") is an association of registered nurses that is dedicated to the advancement of goals and interests of registered nurses and of the nursing professional generally. Founded in 1897, the ANA is comprised of fifty-three constituent member organizations. Registered nurses constitute the largest group of health care providers in this country; there presently are approximately two million registered nurses in the United States. As health care providers, nurses have a long and proud history of support for a fair and equitable health care delivery system in which all Americans have access to basic health services, including services related to reproductive health.

The AMERICAN PUBLIC HEALTH ASSOCIATION ("APHA") is a national organization devoted to the promotion and protection of personal and environmental health and to disease prevention. Founded in 1872, APHA is now the largest public health organization in the world, with over 50,000 members, including 51 state and local affiliate organizations. The APHA represents all disciplines and specialties in public health, including both patients and health profes-

sionals such as physicians, nurses, health educators, and family planning specialists.

AMERICANS FOR RELIGIOUS LIBERTY ("ARL") is a nonprofit, national educational organization whose members represent nearly the entire religious spectrum. ARL is dedicated to defending religious liberty, freedom of conscience, and the constitutional principle of separation of church and state. ARL opposes censorship and any action by government which would prevent counselors from providing full services to clients on reproductive matters.

The ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND ("AALDEF"), founded in 1974, is a national civil rights organization that addresses the critical problems facing Asian American communities, including anti-Asian violence, immigrant rights, voting rights, labor and employment rights, and redress for Japanese Americans who were incarcerated in camps in the United States during World War II. AALDEF seeks to improve the quality of life for Asian immigrant women, who constitute the largest sector of Asian women in the United States. AALDEF has assisted in the formation of the Asian Women's Center located in New York City, which provides shelter with bilingual services for battered women. AALDEF is committed to protecting the fundamental right to reproductive choice by women utilizing health clinics that are funded under Title X of the Public Health and Human Services Act.

The ASSOCIATION FOR WOMEN IN PSYCHOLOGY is an incorporated, nonprofit national educational and scientific organization for feminist psychology founded in 1969. As an organization, it is concerned with the rights of women to function as fully autonomous human beings. Psychological evidence supports freedom of choice as being conducive to good mental health, so that any attempt to limit a woman's freedom of choice regarding reproductive issues is detrimental to her psychological health and well-being. It believes that her right to choose, and access to information facilitating

choice in reproductive matters, should not be denied in the interest of any outside authority.

The ASSOCIATION OF REPRODUCTIVE HEALTH PROFESSIONALS is a professional organization of physicians, nurses and other reproductive health care providers. Its principal objective is to educate its professional members and the public on matters pertaining to reproductive health. Among the health care services its members provide are education and counseling on sexually transmitted diseases, contraception and abortion, in a variety of settings including facilities that obtain Title X funding.

BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, incorporated in 1972, is a nonprofit educational organization devoted to women and health. The organization provides information, resources and technical assistance to the media, health care workers, policy makers, students, women's organizations in the U.S. as well as in other countries, and individuals with particular concerns. It serves about 10,000 persons every year. It is deeply concerned about this matter because high quality, accessible family planning and abortion services are crucial to the health and well-being of women and their families.

The CALIFORNIA COALITION OF NURSE PRACTITIONERS (the "Coalition") represents approximately 5,000 nurse practitioners throughout the state, many of whom work in federally-funded family planning clinics. As an organization representing those nurse practitioners, the Coalition is concerned that the Title X funding of family planning clinics continue without unnecessary governmental interference.

CATHOLICS FOR A FREE CHOICE ("CFFC") is an independent national membership organization established in 1974. One of CFFC's objectives is to protect the legal rights of all women and girls to act as moral agents in decisions related to sexuality and reproductive health care without coercive legal or quasi-legal interference by religious institutions. As Catholics, CFFC members support policies of strict separation of church and state based not only on the U.S.

Constitution but also on the Roman Catholic Declaration on Religious Liberty, Vatican II Dignitais humanae, 7 December 1965, which declares: ". . . the civil authority must see to it that the equality of the citizens before the law, which is itself society, is never violated and that there is no discrimination among its citizens."

The COALITION OF LABOR UNION WOMEN ("CLUW") is a membership organization of 20,000 female and male trade unionists who promote the rights of working women. CLUW, since its founding in 1974, has advocated workplace rules and practices that protect all workers.

COMISION FEMENIL MEXICANA NACIONAL ("CFMN") was founded in 1970 in order to advocate for the needs of the Hispanic woman and her family. CFMN has chartered over 23 chapters and successfully established three human service agencies—Chicano Service Action Center, Centro de Ninos and Casa Victoria. CFMN has a membership base of over 3,000, strongest in California but stretching throughout the southwest. CFMN is a pro-choice organization and believes strongly that every woman, regardless of race or economic status, is entitled to the right of reproductive freedom. CFMN has been in several lawsuits as a co-plaintiff and works tirelessly to ensure the basic freedom of choice for all women.

The CONNECTICUT WOMEN'S EDUCATIONAL AND LEGAL FUND was incorporated in 1973 as a nonprofit public interest law firm advocating for women's legal rights. It has over 400 members and serves thousands of people in New England each year through its litigation, community education, research, and information and referral programs. It joins this brief as *amicus curiae* because it believes it is essential to protect the rights of all citizens to privacy and freedom in reproductive choices. As an organization working for equality, it believes that every woman, without regard to religious belief, income, race, age or disability, must have an equal opportunity to control her own health and reproduction.

The COORDINATING CENTER FOR WOMEN IN CHURCH AND SOCIETY was founded by the 1.7 million member United Church of Christ in 1980 to address the concerns of women and eliminate sexism in Church and Society. The Center is committed to a broad range of strategies to protect reproductive freedom and keep abortion safe and legal. The work of the Center is supported and informed by the policies of the General Synod which has maintained a strong freedom of choice position for two decades.

EQUAL RIGHTS ADVOCATES ("ERA") is a San Francisco-based public interest legal and educational corporation dedicated to working through the legal system to end discrimination against women. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. ERA believes that the right to control one's reproductive life is fundamental to women's ability to gain equality in other aspects of society.

FAMILY PLANNING ADVOCATES OF NEW YORK STATE ("FPA") is the only statewide membership organization dedicated to promoting policies on the full range of reproductive health issues. It is supported by more than 100 organizations, including Planned Parenthood and other family planning agencies, as well as individuals and organizations representative of a wide range of health, welfare and religious groups. FPA is the upstate coordinator for the New York State Campaign for Abortion Rights (NYSCAR).

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, founded in 1973, is the nation's oldest and largest national legal advocacy organization working to further the rights of lesbians and gay men. As an organization representing the lesbian and gay community's belief in the constitutional right to individual liberty, decision making, and bodily autonomy, Lambda strongly supports the position that women in our society are constitutionally entitled to make their own decisions about whether to choose abortion and other reproductive decisions. Since the early 1980's Lambda has also advocated on behalf of people with AIDS who face

discrimination and loss of confidentiality with regard to their healthcare. Lambda strongly opposes the regulations at issue in this case not only because they fail to support the right of a woman to make her own reproductive decisions, but also because of the devastating impact these regulations will have on women with a variety of physical conditions or illnesses, including HIV-related illnesses, which might lead her to consider abortion as an option.

The LEAGUE OF WOMEN VOTERS OF THE UNITED STATES ("LWVUS") is a nonpartisan, nonprofit membership organization with members in all 50 states, the District of Columbia, Puerto Rico and the Virgin Islands. Since its inception in 1920, the LWVUS's purpose has been to promote political responsibility through the informed and active participation of citizens in government. The LWVUS is strongly committed to the belief that the public policy in a pluralistic society must affirm the constitutional right of the individual to make reproductive choices.

The LYMPHOMA FOUNDATION OF AMERICA is a nonprofit charitable organization formed in 1986 by cancer patients and their families. Lymphoma and Hodgkin's disease are types of cancer. The Foundation sponsors support groups and educational programs. Lymphoma Foundation of America believes that every individual has the right to be fully informed about all medical treatments and therapies for his or her particular condition. The Foundation believes that denying someone information about the option of abortion is the same as denying a cancer patient information about the option of having surgery, drugs, or radiation. Withholding basic medical information from someone in need is morally, ethically, medically, and legally wrong.

NAACOG: THE ORGANIZATION FOR OBSTETRIC, GYNECOLOGIC, AND NEONATAL NURSES is the professional nursing organization for 24,000 OGN nurses. Established in 1969, NAACOG members are nurses and allied health care professionals who practice throughout the United States and its territories, Canada, Germany, and Korea.

NAACOG represents the interests of its members whose common concern centers around access to care and quality of care for women, infants, and their families.

The NATIONAL ABORTION RIGHTS ACTION LEAGUE ("NARAL"), has over 400,000 members in 40 state affiliates and the national organization. Founded in 1969, NARAL is the largest national organization dedicated solely to keeping abortion safe, legal and accessible. NARAL recognizes that guaranteeing women the full range of reproductive choices is critical to women's autonomy and equality.

The NATIONAL ASSOCIATION OF NURSE PRACTITIONERS IN REPRODUCTIVE HEALTH ("NANPRH") represents eight hundred nurse practitioners in the field of reproductive health, many of whom work in federally-funded family planning clinics. The NANPRH believes that it is a professional standard that nurses and other health professionals present all available medical options to women faced with pregnancies. Furthermore, the NANPRH believes that it is essential that federally-funded family planning clinics continue to receive Title X funds.

The NATIONAL CENTER FOR LESBIAN RIGHTS ("NCLR"), formerly the Lesbian Rights Project, is a nonprofit public interest law firm founded in 1977 and devoted to the legal concerns of women and men who encounter discrimination on the basis of their sexual orientation, including the area of reproductive rights. NCLR is a national organization with a strong commitment to increasing access to reproductive rights for women, specifically for lesbians, and has demonstrated that commitment through both litigation and community education. Because lesbians are confronted with obstacles, both as women and lesbians, from gaining access to their reproductive rights, NCLR is well qualified to appear as *amicus curiae* before this Court.

The NATIONAL COUNCIL OF JEWISH WOMEN ("NCJW"), founded in 1893, is the oldest Jewish women's organization in America. NCJW's 100,000 members in more than 200 sections across the United States keep the organization's promise to dedicate themselves, in the spirit of Judaism, to advancing human welfare and the democratic way of life through a combination of social action, education and community service. Based on NCJW's concern for individual rights and our national resolutions, which include working for the "protection of every female's right to choose abortion, and the elimination of obstacles that limit reproductive freedom," NCJW joins this brief.

The NATIONAL FEDERATION OF TEMPLE SISTERHOODS represents women of reform judaism. It includes over 100,000 women in over 500 communities throughout the United States. The organization believes that the right of choice on the question of abortion is a personal decision based on the individual woman's religious, moral or cultural values, that this decision should not be determined for others by special interest groups, and that the government should not be the enforcing agency for the points of view of such groups.

The NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY is a nonprofit national advocacy group based in Washington, D.C. Founded in the summer of 1989, the Center monitors—and, where necessary, enforces—federal laws to aid homeless and poor persons. In addition, the Center promotes public policies designed to aid homeless and poor persons. In conducting its activities, the Center regularly takes public positions in support of the interests of the homeless and the poor. The Center believes that further restrictions on federal funding of family planning programs will unfairly and disproportionately burden poor women. Because the Center also believes that these restrictions are illegal, it joins in opposing them.

The NATIONAL LAWYERS GUILD is a national organization representing 8,000 lawyers, legal workers, law students and jailhouse lawyers in over 200 chapters throughout the United States. Since its founding in 1937, the Guild has provided legal support to virtually every struggle in this country for economic, social and political justice. The Guild is firmly

committed and is working actively to protect the rights of all people, and specifically the right of every woman to have access to all forms of family planning, including safe and legal abortion.

The NATIONAL WOMAN'S PARTY, founded in 1913 by Alice Paul, suffragist and author of the Equal Rights Amendment, passed at its September 29, 1989 national convention a resolution on pro-choice, supporting federal, state and local legislation that affirms a woman's right of reproductive choice.

The NATIONAL WOMEN'S CONFERENCE COMMITTEE ("NWCC"), is the continuing committee of the International Women's Year. Founded in 1977, the organization is committed to the "National Plan of Action." The Plan supports among other things the right of pregnant women to choose. NWCC is a national organization pleased to join in this *amicus curiae* brief.

The NATIONAL WOMEN'S HEALTH NETWORK is a national public interest group representing over 500,000 women nationwide. The Network advocates for better governmental health policies regarding women, including access to low-cost family planning services.

The NATIONAL WOMEN'S LAW CENTER is a Washington, D.C.-based legal organization which has been working since 1972 to advance and protect women's legal rights. The Center's primary goal is to ensure that public and private sector practices and policies better reflect the needs and rights of all women. Because of the harsh impact of the Title X prohibition on abortion counseling and referral on the reproductive rights and health of poor women, who are disproportionately women of color, the Center joins as *amicus curiae* to urge the Court to grant petitioners' writ of certiorari.

NATIONAL WOMEN'S POLITICAL CAUCUS is a multi-partisan, nonprofit national membership organization. Founded in 1971, it has over 70,000 members. The CAUCUS works to increase women's political representation and for

social and economic justice for all. The right to reproductive freedom regardless of economic status is one of the CAUCUS' primary goals. The regulations at issue in the present case infringe on women's equal access to information and full medical treatment. This infringement is reprehensible and the CAUCUS signs on as a friend of the court in support of women's equality.

NEW JEWISH AGENDA ("Agenda") is an organization comprised of Jews from a variety of backgrounds and affiliations. Drawing on the Talmudic teaching of *tikkun olam*, the just reordering of society, Agenda works for peace and social justice by applying Jewish religious and secular history and values to local organizing on current domestic and international concerns. Priority issues include peace and justice in the Middle East and Central America, feminism, disarmament, economic and social justice, lesbian and gay rights, and opposition to racism, anti-Semitism and apartheid. New Jewish Agenda was founded in December, 1980 and now has chapters in more than 45 American cities. Agenda's 5,000 members work to foster traditional progressive Jewish values and to promote Jewish participation in progressive coalitions.

The NEW YORK STATE REPUBLICAN FAMILY COMMITTEE is an educational agency advocacy organization devoted to promoting policies that foster maximum choice, particularly in matters of health. Founded in 1984, the Committee has over 300 Republican party members with ninety-nine percent residing in New York State. Its membership includes lawyers, health care professionals, business people, educators, philanthropists, and numerous civic and political leaders.

The NORTHWEST WOMEN'S LAW CENTER is a private nonprofit organization in Seattle, Washington, that works to advance the legal rights of women by means of litigation, legislation, education, and providing information and referrals. Protecting women's freedom of reproductive choice is one of the Law Center's priority issue areas. The Law Cen-

ter has participated in several cases involving reproductive rights before the U.S. Supreme Court and other courts.

The NOW LEGAL DEFENSE AND EDUCATION FUND ("NOW LDEF") is a nonprofit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination, secure equal rights, and preserve reproductive options under law.

The PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND is a national organization founded in 1972 to protect civil rights and to ensure equal protection of the laws for Puerto Ricans and other Latinos. The Fund has participated in lawsuits and has served as an advocate to ensure that Latinos have access to full and adequate health care, including family planning. The Fund recognizes that restrictions or limitations on the provision of health services, including information concerning abortions, deny women access necessary to fully exercise their rights, and place Latinos at an even greater risk of inadequate and dangerous treatment and unwanted pregnancies.

The RELIGIOUS COALITION FOR ABORTION RIGHTS ("RCAR") is a national coalition of 34 Protestant, Jewish and other faith groups committed to religious freedom and reproductive rights. Because each denomination and faith group represented in RCAR approaches the issue of choice from the unique perspective of its own theology, members hold widely varying viewpoints as to when abortion is morally justified. It is exactly this plurality of beliefs which leads RCAR to the conviction that the abortion decision must remain with the individual to be made on the basis of conscience and personal religious principles, free from governmental interference.

The SEX INFORMATION AND EDUCATION COUNCIL OF THE U.S. ("SIECUS") is a twenty-five year-old national nonprofit organization headquartered in New York. SIECUS affirms that sexuality is a natural and healthy part of living and advocates the right of individuals to make

responsible sexual choices. SIECUS provides information services to professionals, students, and members of the general public across the United States. SIECUS deplores any attempts to undermine women's reproductive health rights. The SIECUS Board of Directors has passed a position statement supporting the right to choose abortion, which states in part, "SIECUS believes a woman is entitled to have full knowledge of alternatives available to her and to have complete and unbiased information and counseling concerning the nature, the consequences, and the risks, both of the abortion procedure and of pregnancy and childbirth." SIECUS believes that the February 1988 regulations would deny women the right and the ability to make responsible choices.

The SOUTHERN CALIFORNIA WOMEN'S LAW CENTER was established in 1989 as the first Law Center in Southern California solely devoted to addressing the civil rights of women and girls. The Law Center has identified the following priorities of its work: reproductive rights, sex discrimination in employment, sex discrimination in education, family law, domestic violence and child care. The Law Center's primary efforts in addressing these priorities emphasize support and technical and legal assistance to legal services agencies, community based organizations, attorneys and policymakers.

The WISCONSIN NURSE PRACTITIONERS IN REPRODUCTIVE HEALTH ("W.N.P.R.H.") is a statewide nursing organization dedicated to providing quality reproductive health care. W.N.P.R.H. joins this brief as *amicus curiae* because it believes that responsible and healthful decision making is based on thorough education with respect to all options available to the health care consumer.

WOMEN'S EQUAL RIGHTS LEGAL DEFENSE AND EDUCATION FUND ("WERLDEF") is a nonprofit California corporation primarily serving the greater Los Angeles community. Established in 1978, WERLDEF was organized to ensure that women will be treated equally under the law. WERLDEF achieves its goals by educating women about

their legal rights, and assisting them in vindicating those rights by providing access to the courts. WERLDEF often receives calls from pregnant women who cannot afford the cost of a private doctor but who require information regarding their full range of choices vis a vis their pregnancy/parenthood. It is WERLDEF's policy to refer these women to medical clinics where they can obtain thoroughly reliable and accurate medical information and attention.

The WOMEN'S LAW CENTER is an advocacy organization whose membership consists of attorneys and judges in the State of Maryland. In existence since 1971, the goal of the Women's Law Center is to promote the legal rights of women through litigation, legislation and education. Our organization believes the regulations at issue in *New York State v. Sullivan*, which would deny federal funding for family programs that provide abortion information, services or referral, pose a critical threat to the reproductive rights of women.

The WOMEN'S LAW PROJECT ("WLP") is a nonprofit law firm dedicated to advancing the status and opportunities of women. WLP believes that the right to reproductive choice is an essential component of women's ability to play an equal role with men in this society, and has engaged in extensive litigation and public education designed to protect women's legal right to abortion.

The WOMEN'S LEGAL DEFENSE FUND ("WLDF") is a tax-exempt nonprofit membership organization founded in 1971 to challenge sex-based discrimination and to advocate for women's rights in society. WLDF believes strongly that to participate fully and equally with men in society, all women must have the right to decide for themselves whether and when to carry their pregnancies to term.

The YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF U.S.A. ("YWCA"), a national membership organization whose mission is the empowerment of women and the elimination of racism, strongly supports reproductive freedom of choice. Because the Department of Health and Human Services' regulations restrict that freedom, and run counter to First Amendment protection, the YWCA supports the position taken in this *amicus curiae* brief.

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CASE NOS. 89-1391, 89-1392

In The United States Supreme Court

October Term, 1989

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v.

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Respondent,

and

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DR. LOUIS SULLIVAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF OHIO IN SUPPORT OF PETITIONERS

By ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

With Attorneys General Joining for the States of **ALASKA, CALIFORNIA, CONNECTICUT, MAINE, NEBRASKA, OREGON, AND TEXAS, AND THE CORPORATE COUNSEL FOR THE DISTRICT OF COLUMBIA**

ANTHONY J. CELEBREZZE, JR.,
Attorney General of Ohio

RITA S. EPPLER
Chief, Federal Litigation Section
(Counsel of Record)

JACK W. DECKER
Assistant Attorney General
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-5414

[Other Counsel Listed Inside Front Cover]

HONORABLE DOUGLAS B. BAILY
Attorney General of Alaska
P.O. Box K, State Capitol
Juneau, Alaska 99811-0300
(907) 465-3600

HONORABLE JOHN K.
VAN DE KAMP
Attorney General of California
1515 K. Street
Sacramento, California 95814
(916) 324-7860

HONORABLE CLARINE NARDI
RIDDLE
Attorney General of Connecticut
55 Elm Street
Hartford, Connecticut 06106
(203) 566-2026

HONORABLE HERBERT O.
REID, SR.
Corporate Counsel for the
District of Columbia
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 727-6248

HONORABLE JAMES E. TIERNEY
Attorney General of Maine
State House Station 6
Augusta, Maine 04333
(207) 289-3661

HONORABLE ROBERT M. SPIRE
Attorney General of Nebraska
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

HONORABLE DAVE
FROHNMAYER
Attorney General of Oregon
100 Justice Building
Salem, Oregon 97310
(503) 378-6002

HONORABLE JIM MATTOX
Attorney General of Texas
P.O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 463-2100

QUESTIONS PRESENTED

Petitioners the State of New York and Dr. Irving Rust, et al., have presented four questions eaci. for review. Amicus State of Ohio wishes to address these questions as follows:

1. Do new regulations promulgated by HHS under Title X of the Public Health Service Act which prohibit abortion counseling, referral and advocacy in programs funded under the Act and require physical separation of Title X funded facilities and facilities engaging in abortion-related services, violate the woman's and the health professional's First Amendment rights?

2. Does the regulations' prohibition of abortion counseling and referral in a Title X-funded program violate the woman's constitutionally protected privacy right to make a fully informed decision on whether or not to continue her pregnancy?

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BRIEF OF AMICUS CURIAE STATE OF OHIO IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

This brief is filed by Anthony J. Celebrezze, Jr., Attorney General of Ohio, joined by the states of Alaska, California, Connecticut, Maine, Nebraska, Oregon, and Texas, and the District of Columbia. These states,[1] where Title X funds are utilized to provide health care services to hundreds of thousands of citizens,[2] have joined together to urge this Court

[1] Most state agencies that receive and disburse Title X funds are members of the association entitled the National Family Planning and Reproductive Health Association ("NFPRHA") and are plaintiffs-appellees in *Massachusetts v. Secretary of Health and Human Services*, No. 88-1279, Slip Op., 1990 U.S. App. LEXIS 4236 (1st Cir. March 19, 1990) (en banc).

[2] State agencies in the *amici* states of Ohio, California, ~~Maine~~, Nebraska, Oregon, and Texas, and the District of Columbia participate directly in the Title X program. All of the amici states have local Title

to grant the Writ of Certorari filed by Petitioners in Case Numbers 89-1391 and 89-1392.

This case presents issues of critical national importance. The amended regulations to the Public Health Services Act, Title X, if permitted to go into effect, will force states to choose between accepting federal Title X funds under a program which will provide incomplete and possibly misleading medical information and invade the integrity of the physician-patient relationship, and forfeiting receipt of Title X funding altogether. Either option will have devastating repercussions on the abilities of the *amici* states to provide effective family planning and related health care services to low income women.

The state agencies that both receive and disburse Title X funds have a unique interest in the regulations issued by the Department of Health and Human Services (hereinafter HHS). Most of the *amici* states provide matching funds from their own revenues to support Title X projects. The regulations, as amended, would expand the definition of "Title X Project" in such a way as to require that these *state* funds also be used to provide misleading and possibly medically dangerous information to women. The amendments will unnecessarily impede these states' capacities to allocate their own funds to provide more balanced post-pregnancy counselling and referral services, even outside the ambit of the federal Title X program.

SUMMARY OF ARGUMENT

Amici states support and join in the arguments presented by Petitioners and *amici*, the American Public Health Association, *et al.* Most of these arguments will not be reiterated here. Rather, this brief will focus on issues of particular concern to Ohio and the other *amici*.

[2] *footnote cont.*
X grantees within their borders. The sacrifice of the health and welfare of low income women is, naturally, of great concern to all the *amici* states.

Because the regulations at issue in these petitions will result in provision of incomplete and slanted information to the women of Ohio and other states, they will undermine, rather than promote, each individual woman's right to make in an informed way her own reproductive health decisions. Because the amended regulations forbid a Title X physician from discussing the abortion option with a woman, even when the abortion may be advisable to protect her health, they directly jeopardize the health of the patient. Because the regulations require a Title X physician to practice medicine in a way which conflicts with sound medical practice and professional ethics, should the regulations go into effect in Ohio and other states, many Title X providers may simply refuse further participation in the program. That would result in more restricted access to Title X facilities by the states' low income women, many of whom have no alternative source of care, and further adverse consequences to the health of these women.

Moreover, the decision below must be reversed because it conflicts with the law as established by this Court. The amended regulations cannot be upheld under the government's discretion not to fund certain programs, because the rules regulate pure speech in a content-discriminatory manner. The amended regulations require the dissemination of information about childbearing but censor speech about abortion. The amended regulations establish a rigid, misleading exchange between patient and physician, which, under the imprimatur of a government program, implies to the patient that she has received full information about her choices. In fact, the option to terminate her pregnancy has not been disclosed. By intentionally misleading the patient regarding her choices, the regulations erect an impermissible obstacle to the woman's liberty and privacy rights to determine what shall be done with her body.

In addition, the regulations impose an unconstitutional condition upon the receipt of a government benefit. Title X provides both grants to Title X clinics, and subsidies for medical, counselling and referral services to Title X patients. As a condition to receiving these benefits, both the patient

and health professional must relinquish their First Amendment rights to exchange information about the termination of pregnancy. The federal government cannot require this gag on pure speech consistent with the First Amendment.

Finally, the regulations redefine the scope of the Title X project in such a way that matching funds provided by Ohio and other *amici* states would be swept within the new rules. If the states continue to participate, state tax dollars would be required to be used to mislead needy women regarding their choices and perhaps to jeopardize their health. Such conditions on the expenditure of state monies would be inconsistent with the constitutional spending power of Congress because such requirements would not promote the public welfare, the conditions for state participation are vague, the regulations contravene the purpose of Title X funding, and the rules would require state funds be used to defeat the constitutional rights of Title X patients.

REASONS FOR GRANTING THE WRIT

I. THE TITLE X AMENDED REGULATIONS WILL RESULT IN DETERIORATION OF HEALTH CARE SERVICES TO LOW INCOME WOMEN AND WILL PROVIDE INCOMPLETE AND MISLEADING INFORMATION TO WOMEN MAKING REPRODUCTIVE HEALTH DECISIONS.

This Court has held that the government may, in the exercise of its spending powers, flatly decline to pay for the medical procedure of abortion, *Harris v. McRae,* 448 U.S. 297, *reh. denied,* 448 U.S. 917 (1980); *Maher v. Roe,* 432 U.S. 464 (1977), or refuse to permit the procedure to be performed in government-owned facilities, *Webster v. Reproductive Health Services,* 109 S. Ct. 3040 (1989), notwithstanding a woman's constitutional right to freedom of reproductive choice. *Roe v. Wade,* 410 U.S. 113 (1973). This Court's decision in *Webster* did not address the issue presented herein, as the majority concluded the First Amendment question presented by the prohibition on

abortion counselling and referral from publicly funded family planning clinics was moot. 109 S. Ct. at 3053-54. It was further noted that a constitutional issue could arise if the statute were interpreted to prohibit publicly employed health professionals from giving specific medical advice. *Id.* at 3060 (O'Connor J., concurring), 109 S. Ct. at 3069 n.1 (Blackmun J., concurring).

The Second Circuit, relying upon *Maher, Harris, and Webster,* impermissibly extended the idea that the government may refuse to subsidize the medical procedure of abortion to find that the government may suppress pure speech. The Second Circuit has authorized regulations which serve to interfere with the integrity of the physician-patient relationship. Tampering with the physician-patient relationship will result in health care professionals providing less than complete information, at best, and more likely, misleading information to women faced with the need to make reproductive health decisions. Contrary results, that the amended regulations violate the privacy interests of women and First Amendment interests of women, physicians, and health care professionals, have been reached in the United States Court of Appeals for the First Circuit and the United States District Court in Colorado. *Massachusetts v. Secretary of Health and Human Services,* No. 88-1279, Slip Op., 1990 U.S. App. LEXIS 4236 (1st Cir. March 19, 1990) (en banc); *Planned Parenthood Federation of America v. Bowen,* 680 F. Supp. 1465 (D. Colo. 1988) (appeal pending). This case presents the opportunity for this Court to resolve the discrepancy between the circuits and affirm the need for free flow of information before informed choice can occur.

A. THE AMENDED REGULATIONS WILL RESULT IN DETERIORATION OF HEALTH CARE SERVICES TO THOSE IN MOST DESPERATE NEED.

Title X of the Public Health Service Act authorizes grants to profit and non-profit organizations "to assist in the establishment and operation of voluntary family planning projects" servicing mostly low income families. 42 U.S.C.A. 300, et seq. (West 1982). Title X is the single largest voluntary

family planning program funded by the federal government, providing over one-third of the total public family planning funds. Comment, *The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights?* 41 Stan. L. Rev. 401, 408 (1989) [hereinafter *Gag Rule*]. Title X serves approximately 4,300,000 low income women annually through more than 4,000 family planning clinics which receive some $140 million in Title X grants. McCarthy, *The Prohibition on Abortion Counseling and Referral in Federally-Funded Family Planning Clinics,* 77 Calif. L. Rev. 1181, 1183 (1989) [hereinafter *Abortion Counseling*]. Entities receiving Title X funds include health departments at the state, county and municipal levels, family planning clinics, hospitals, and community health organizations. Public health departments receive approximately 40 per cent of the available Title X funds. *Gag Rule,* 41 Stan. L. Rev. at 408. States that receive Title X funds are required to provide a minimum of 10 per cent matching grants of state money. 42 U.S.C.A. §300a-4 (West 1982).

The reach of the amended regulations extends far beyond the mere expenditure of federal dollars. "Title X Programs" and "Title X Projects" as redefined include not only direct federal subsidies, but any other funds, public or private, used in the Title X project. 42 C.F.R. §59.2 (1988). If a state contributes to the Title X project, or if the clinic uses its own private funds to support Title X activities, the use of these alternative funds is likewise held hostage to the Title X requirements, and gagged as well.[3] Thus, even if state departments of health, or state Title X clinics or their private supporters, vehemently disagree with the requirement to

[3] In 1989 over 142,000 women in Ohio were provided family planning services through Title X activities based on multiple sources of funding including state funds, client fees, Medicaid, and Title XX and Maternal and Child Health (MCH) Block Grants. *See* United States Department of Health and Human Services, Public Health Service, Bureau of Community Health Services, Common Reporting Requirement Fact Sheets, Table 2(B). (Summary reproduced at Appendix A). The combined funding sources provided $12,866,455.00 for health care services to women in Ohio with approximately 38 per cent comprised of Title X funds. *Id.*

suppress information, these non-federal parties must either accept the requirement that their *own funds* be used to suppress information, or must completely forego participation in Title X. Either alternative will have a dramatic effect on health care services provided to low income women across the county.

Like New York, the *amici* states are concerned that the amended regulations will have a devastating impact on health care services to low income women. It is feared that a significant number of reliable Title X providers will find continued participation in Title X to be medically and ethically unsound and will simply opt out of the program, making them able to serve far fewer women because of the substantial loss of funding.[4]

The substantial benefits of publicly funded family planning programs cannot be examined without an appreciation for the enormous role played by public health care dollars in providing services to low income women. Publicly funded family planning services play an important role in allowing substantial numbers of women to prevent unintended pregnancies. Researchers estimate the use of contraceptives from publicly funded providers are responsible for preventing up to 3.1 million unintended pregnancies annually. Forrest and Singh, *Public-Sector Savings Resulting from Expenditures for Contraceptive Services,* 22 Fam. Plan. Persp. 6, 11 (1990). Many low income women, without access to public health facilities, would no longer be able to prevent unintended pregnancies, resulting in a rise in unintended births and abortions. The amount of money saved[5] as a result

[4] "In spite of the diversity of the recipient clinics, their reactions to the Regulations are generally consistent. . . . [T]he National Family Planning and Reproductive Health Association, which represents 85 per cent of the recipients of federal money, predicts that the majority of current programs would refuse to withhold neutral abortion information from their clients." *Gag Rule,* 41 Stan. L. Rev. at 408, and n.38.

[5] The expenditure of funds for family planning services conserves additional state and federal government subsidies that would be spent for Medicaid, Aid for Dependent Children, General Relief, and other assistance.

of contraceptive use by women relying on publicly funded providers represents up to $11.26 for each dollar spent to provide those services, resulting in a total annual savings up to 4.6 billion dollars. *Id.* at 11-12.

Nationwide, eighty per cent of all Title X patient recipients have annual incomes below 150 per cent of the federal poverty level.[6] *Gag Rule,* 41 Stan. L. Rev. at 408 n.36. These are the persons who can least afford to pay for family planning services and yet are the very persons that will receive either less than full information upon which to make reproductive health choices or far fewer family planning services from non-federally funded programs.

B. THE AMENDED REGULATIONS WILL SUPPRESS THE FLOW OF COMPLETE MEDICAL INFORMATION NECESSARY FOR INFORMED CHOICE.

Despite Congress' numerous refusals to amend Title X to bar use of government funds to inform women of the availability of abortion, HHS in 1987 elected to accomplish the same result by administratively "reinterpreting" the Act. *See Abortion Counseling,* 77 Cal. L. Rev. at 1184-85. In so doing, HHS rejected its own longstanding interpretation of the Act to require "non-directive" counseling of pregnant patients regarding both abortion and its alternatives. *State of New York v. Sullivan,* 889 F.2d 401, 405 (2d Cir. 1989). The HHS amended regulations reverse the agency's stance by declaring the Title X "family planning" function to terminate with pregnancy. 42 C.F.R. §59.2 (1988). Under this guise of neutrality, the amended regulations then require the clinic's remaining dialogue with the pregnant patient to encourage childbearing.

[6] The Ohio Department of Health, Federation for Community Planning, and Planned Parenthoods of Summit, Portage, Medina Counties and Central Ohio combined in 1989 to serve a total of over 142,000 women. Of those women served, over 123,000 were at or below 150 percent of the federal poverty level. *See* Summary Table, Appendix A.

The HHS amended regulations seek to prevent pregnant women served by clinics funded under Title X from learning of the availability of abortion regardless of the circumstances. In fact, under the amended regulation a physician would be precluded from raising the issue of abortion or responding to questions raised by a patient even if carrying a child to term would result in a threat to the life or health of the mother. 42 C.F.R. §59.8(b) (1988).

The regulations forbid the clinic to provide any referral for an abortion. 42 C.F.R. §59.8(a)(1) (1988). However, the clinic is affirmatively required to refer the pregnant patient "for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child."[7] 42 C.F.R. §59.8(a)(2) (1988). Any referral list given to the patient must exclude "health care providers whose principal business is the provision of abortions," but may *not* exclude, for any reason, any agency which does not provide abortions. 42 C.F.R. §59.8(a)(3) and (b)(4) (1988).

In case there is any doubt about the meaning or intent of the regulations, it is resolved by the examples contained therein. If a patient asks her physician whether an abortion is medically advisable, or even simply requests a referral for an abortion, the clinic physician's or health care professional's response is scripted by the amended regulations. The physician, regardless of the non-emergency medical condition, can only respond by stating "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion. . . . [T]he project can help [you] to obtain pre-natal care. . . ." 42 C.F.R. §59.8(b)(5) (1988). The woman must then be given a list of all providers of pre-natal care from which any providers whose principal business is abortion must be excised. The clinic may neither include an abortion clinic, nor exclude a provider of pre-natal services, from the list. 42 C.F.R. §59.8(b)(3) and (b)(4) (1988). A woman requesting abortion referral services may not even be given the Yellow

[7] The only exception to the mandatory referral for pre-natal care is when emergency care is required. 42 C.F.R. §59.8(a)(2) (1988).

Pages to locate and call an abortion provider herself, since the telephone book constitutes a "list" which may contain "forbidden" providers. 53 Fed. Reg. 2922, 2942 (1988).

In the decision below the concurring judge found these regulations "jeopardize[ ] the ability of Title X physicians to safeguard the health of those seeking their expert advice." *State of New York v. Sullivan,* 889 F.2d at 415 (Cardamone J., concurring). The ban on providing even a telephone book to a needy client was deemed "a small and petty contrivance, inconsistent with our nation's high principles." *Id.*

II. THE DECISION OF THE SECOND CIRCUIT CONTRAVENES RULINGS OF THIS COURT WHICH PROTECT THE PRIVACY, LIBERTY, AND FIRST AMENDMENT INTERESTS IN WOMEN MAKING INFORMED CHOICES REGARDING THEIR REPRODUCTIVE HEALTH, AND WHICH PROHIBIT THE USE OF FEDERAL SPENDING TO INFLUENCE IMPROPERLY A STATE'S DISPOSITION OF ITS OWN RESOURCES.

A. THE AMENDED REGULATIONS IMPOSE AN IMPERMISSIBLE OBSTACLE TO A WOMAN'S PERSONAL REPRODUCTIVE CHOICE, IN VIOLATION OF HER LIBERTY AND PRIVACY RIGHTS AS PROTECTED BY THE CONSTITUTION.

Whatever degree of constitutional protection a woman's choice to abort her pregnancy may now enjoy, it is clear that, at the very least, the government may not impose impermissible obstacles to thwart the abortion decision. *Harris v. McRae,* 448 U.S. 297, 314, *reh. denied,* 448 U.S. 917 (1980); *Maher v. Roe,* 432 U.S. 464, 473 (1977). The HHS regulations fail even this minimal test.

This Court's decisions have made it clear that central to the woman's privacy right is the opportunity to make an informed decision. *See Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 759, 762 (1986); *City of Akron v. Akron Center for Reproductive Health,*

462 U.S. 416, 429-30 (1983). As observed in another context by the United States Court of Appeals for the District of Columbia Circuit:

> The root premise is the concept, fundamental in American jurisprudence, that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body . . . ." True consent to what happens to one's self is the informed exercise of a choice, and that entails an *opportunity to evaluate knowledgeably the options available and the risks attendant upon each.* The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision.

Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972) (emphasis added) (footnotes omitted), *cited* in *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. at 799 (White, J., dissenting).

The Second Circuit determined, on the basis of *Maher, Harris,* and *Webster v. Reproductive Health Services,* 109 S. Ct. 3040 (1989), that no one has the "right" to federally-funded abortion counseling. *State of New York v. Sullivan,* 889 F.2d at 410-12. The lower court reasoned that a pregnant woman, therefore, is left in the same position as if the government had funded no counseling at all, and none of her rights are infringed. *Id.* The conclusion, that the woman is constitutionally unharmed by this funding decision, defies reality, and constitutes a "shell game" with what is actually being funded.

Despite the regulations' disingenuous disclaimer that pregnancy counseling and referral are now beyond the scope of Title X family planning services, the rules *do* provide for federal funding of a counseling and referral conversation between health care professional and patient. The Title X

clinic is required to counsel the patient by telling her that the project deems abortion to be an inappropriate option, and it must refer her to providers of pre-natal care even if she wants an abortion. 42 C.F.R. §59.8(b)(5) (1988). Rather than simply refusing to subsidize counseling and referral, the regulations endeavor to censor the contents of the funded counseling and referral to conceal the abortion option from the patient.

Therefore, the patient does not remain in the same position as she would have been had the government decided not to fund any Title X services. As found by the First Circuit:

> We are particularly struck by the effect these restrictions have on poor women who are forced to rely on Title X clinics. They are significantly worse off than they would have been if the government had not provided the clinics because they have received misinformation rather than no information about their options. In addition, because most Title X clients pay a portion of the cost of the services (based on a sliding scale), the client's ability to go elsewhere has been significantly diminished because she has already paid what she could afford to the Title X clinic.

Massachusetts v. Secretary of Health and Human Services, No. 88-1279, Slip. Op., 1990 U.S. App. LEXIS 4236, 52-53, (1st Cir. March 19, 1990) (en banc).

The amended regulations pose a trap for the unsophisticated and unwary patient. Although the exchange between the woman and Title X professional has all the appearances of government-sponsored counseling and referral, from which the patient is likely to conclude she has received full information, only incomplete counseling and referral have occurred. Although information about abortion is forbidden, information regarding pre-natal care must be given to pregnant women. 42 C.F.R. §59.7 (1988). Consequently, the patient has been affirmatively misled.

The government can therefore remain neutral, in the same sense it has been deemed by this Court to remain neutral in refusing to fund the entire abortion procedure, only by refusing entirely to fund *any* counseling and referral procedure. Neutrality can be accomplished only by either full disclosure of all options or by refusal to discuss *either* abortion or childbirth options with the patient, and by refusal to make *any* referrals to either pre-natal care or abortion service providers.[8] Otherwise, the regulations do not simply fail to remove obstacles to abortion; they create obstacles.

This case does not present a question which may be simply resolved on the basis of the government's power to tax and spend. The distorted information required to be dispensed compromises the patient's right to make a fully informed choice. As found by the Eighth Circuit in striking down a similar state ban on the use of state funds to counsel or encourage abortion:

> We think that the state's analogy of its ban on "encouraging or counseling" to bans on public abortion funding is completely inapt. Missouri is not simply declining to fund abortions when it forbids its doctors to encourage or counsel women to have abortions. Instead, it is erecting an obstacle in the path of women seeking full and uncensored medical advice about alternatives to childbirth. The state's limitation on doctor-patient discussions reflects the state's choice for childbirth over abortion in a way that prevents the patient from making a fully informed and intelligent choice.

Reproductive Health Services v. Webster, 851 F.2d 1071, 1080 (8th Cir. 1988), *rev'd on other grounds*, 109 S. Ct. 3040 (1989). This finding was not disturbed in this Court's *Webster* decision. *See supra* at 4-5.

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[8] This is not to say that a prohibition on *any* counselling or referral would be consistent with the authorizing statute. *See* Petition of the State of New York, *et al.* at 16-22.

In *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. at 444-45, this Court struck down an ordinance which required the physician to inform the patient of a "parade of horribles" which implied that the abortion procedure was particularly dangerous. The compulsory provision of misinformation to the patient was deemed to have imposed an "undue obstacle" to her freedom of reproductive choice. Eventually, even two of the three dissenters in *City of Akron* apparently agreed with this result:

> I have no quarrel with the general proposition, for which I read *Akron* to stand, that a campaign of state-promulgated disinformation cannot be justified in the name of "informed consent" or "freedom of choice."

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. at 800 (White, J., joined by Rehnquist, J., dissenting).

One is unable to choose between two options if one is kept unaware by the government that one has a choice at all. Intentionally incomplete and misleading information about one's options is indistinguishable from the "disinformation" at issue in *City of Akron*. Consequently, the result in this case should be the same. Because the counseling and referral required by the amended regulations create the impression of full disclosure while concealing the option to terminate pregnancy, the government has imposed an impermissible obstacle to a woman's right to choose. This Court should find the amended regulations violate the constitutional privacy and liberty interests in freedom of reproductive choice.

B. THE AMENDED REGULATIONS VIOLATE THE FIRST AMENDMENT RIGHTS OF TITLE X PATIENTS AND HEALTH CARE PROVIDERS.

Maher, *Harris*, and *Webster* held that the government's control over its own purse strings justified a refusal to fund, or permit on its premises, abortion *procedures*, while at the

same time funding and permitting childbirth *procedures*. These cases did *not* reach the question whether the federal government may use its considerable taxing and spending powers to suppress *speech* regarding the advisability of abortion.

The First Amendment right to give and receive information about matters of great public concern remains firmly atop the heirarchy of constitutional values. *See e.g., Murdock v. Pennsylvania,* 319 U.S. 105, 115 (1943). And the right to give and receive information about abortion has long been recognized as enjoying First Amendment protection. *Bigelow v. Virginia,* 421 U.S. 809 (1975). Because the contested rules directly regulate speech, the reliance placed by HHS and the Second Circuit on *Maher, Harris,* and *Webster* is misplaced. Rather, this Court's decisions on government's manipulation of First Amendment rights through its spending powers mandate the opposite result.

In *Consolidated Edison Co. v. Public Service Comm.,* 447 U.S. 530 (1980), this Court struck down a state regulation which forbade a public utility from inserting into its billings any discussion of "political matters," including the advisability of nuclear power. Naturally, public utilities are heavily-regulated entities which enjoy a state subsidy in the form of a state-created monopoly. *Id.* at 549 (Blackmun, J., dissenting). This Court noted:

> The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. . . . If the marketplace of ideas is to remain free and open, governments must not be allowed to choose "which issues are worth discussing or debating. . . ." To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.

Id. at 537-38, *quoting, Police Department of Chicago v. Mosley,* 408 U.S. 92, 96 (1972) (additional citations omitted).

Other of this Court's decisions have clearly suggested that the government's privilege to subsidize or refuse to subsidize speech ends where the funding choice is no longer content-neutral. *Regan v. Taxation with Representation,* 461 U.S. 540 (1983), involved federal subsidies to charitable organizations in the form of tax deductions for contributions to these entities. This Court did hold that Congress could refuse to subsidize *all* lobbying activities by 501(c)(3) charitable organizations without violating those organizations' First Amendment rights. The Court was careful to point out, however, that the restriction on deductability for lobbying was content neutral. "The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to' "ai[m] at the suppression of dangerous ideas." ' " *Id.* at 548, *citing, Cammarano v. United States,* 358 U.S. 498, 513 (1959), *quoting, Speiser v. Randall,* 357 U.S. 513, 519, *reh. denied,* 358 U.S. 860 (1958).

Similarly, in *F.C.C. v. League of Women Voters,* 468 U.S. 364 (1984), this Court struck down a prohibition on on-air "editorializing" by publicly-subsidized educational television stations. While arguing the content-neutral ban should be upheld, as a permissible election not to subsidize on-air editoralizing, the dissent noted:

> This is not to say that the Government may attach any condition to its largess; it is only to say that when the Government is simply exercising its power to allocate its own public funds, we need only find that the condition imposed has a rational relationship to Congress' purpose in providing the subsidy and that it is not primarily" ' "aimed at the suppression of dangerous ideas." ' "

Id. at 407, (Rehnquist, J., dissenting), *quoting, Cammarano v. United States,* 358 U.S. at 513, in turn *quoting, Speiser v. Randall,* 357 U.S. at 519, in turn *quoting, American Communications Assoc. v. Douds,* 339 U.S. 382, 402 (1950). *See also Arkansas Writers' Project v. Ragland,* 481 U.S. 221

(1987).

Because the challenged regulations directly affect speech in a viewpoint-discriminatory manner, and are manifestly aimed at suppressing the "dangerous idea" of abortion, they cannot be upheld on the basis of *Maher, Harris,* and *Webster.*

Rather, this Court has long held that the state may not condition receipt of a valuable benefit on the forfeiture of a constitutional right. In *Perry v. Sindermann,* 408 U.S. 593, 597 (1972), the Court declared:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech .... This would allow the government to "produce a result which [it] could not command directly."

citing *Speiser v. Randall,* 357 U.S. at 526 (tax exemption subsidy cannot be conditioned on forced speech); *see also, Elrod v. Burns,* 427 U.S. 347 (1976) (continued public employment cannot be conditioned on forfeiture of rights to political association); *Sherbert v. Verner,* 374 U.S. 398 (1963) (unemployment benefits cannot be conditioned on relinquishment of religious convictions).

Here, HHS conditions the grant of Title X subsidies to family planning providers, and the grant of Title X-subsidized counseling and referral services to needy women, on both parties' relinquishment of their mutual First Amendment rights to exchange full and complete information about reproductive choices. This cannot be done consistently with the long-standing decisions of this Court.

C. THE AMENDED REGULATIONS IMPOSE UNCONSTITUTIONAL CONDITIONS UPON THE EXPENDITURE OF STATE FUNDS COMMITTED TO TITLE X PROJECTS.

The amended regulations affect the ability of states to use state revenues as they see fit to fund Title X projects. As previously discussed, the amended regulations redefine "Title X project" to include not only the federal Title X grant, but also the state, local, or private funds which must be committed to the Title X project. Therefore, the regulations pose a Hobson's choice for any states which do not agree that pregnant women are best served by state-enforced ignorance of their options. The state must either forego all federal aid for family planning services, or, to the extent it supplies matching funds, spend those funds in a manner the state might well find wholly objectionable. *See supra* at 6-7.

The regulations run afoul of the Constitution's Spending Clause. U.S. Const. art. I, §8. In *South Dakota v. Dole,* 483 U.S. 203, 207-08 (1987), this Court recently summarized the four separate constitutional limitations upon federal use of its spending power to influence a state's exercise of its own constitutional powers: 1) the federal spending exercise must be in pursuit of the "general welfare," and Congress is entitled to substantial deference in determining what the "general welfare" is; 2) any conditions on state acceptance of the grant must be unambiguous, in order that the state may know in advance the consequences of its participation; 3) the conditions must be related to the purpose of the federal expenditure; and 4) the federal spending power may not be used to induce the states to engage in activities which are themselves unconstitutional. The amended regulations fail all four tests.

First, keeping women in the dark regarding their reproductive options is not in anyone's best interest. Rather, this approach is directly antithetical to the philosophy, firmly embedded in the First Amendment, that the public interest is best served by the free competition of ideas in the

marketplace of public opinion. *Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Further, as eloquently detailed in the *amicus* brief of the American Public Health Association, there are numerous circumstances under which the absolute prohibition on abortion referral will result in serious jeopardy to the health of the mother and will violate sound medical practice. Moreover, it is impossible to give deference to Congress' determination of the public interest when the amended regulations appear more a product of administrative fiat than an expression of Congressional will. *See* Petition of State of New York *et al.,* pp. 16-24; Petition of Dr. Irving Rust, *et al.,* pp. 20-27.

Second, some of the regulations impose conditions on state spending which are far from clear. For example, 42 C.F.R. §59.9 (1988) requires that at least some personnel or facilities used for "prohibited activities" be separate from those used for Title X activities, even if the prohibited activities are not funded by Title X. The separation requirements are merely factors to be considered by the Secretary of HHS in deciding whether a grantee is in violation of the regulations. The rule contains virtually no standards from which HHS bureaucrats may determine compliance, except that "mere bookkeeping separation" is insufficient. *Id.* Participating states will remain unsure under what circumstances they may separately fund "prohibited" abortion counseling and referral activities, without undergoing the crippling expense of employing separate personnel or obtaining separate physical facilities.

Third, Title X is, first and foremost, a public health program. The amended regulations operate in a manner contrary to the Congressionally-mandated purpose for the spending, in the same manner that they operate contrary to the "public welfare." Fourth, the amended regulations would induce the states to use state monies to support services performed in such a way as to violate the constitutional rights of women and health care professionals.

The new regulations far exceed a mere value judgment affecting the expenditure of federal dollars. The regulatory

scheme also conditions states' participation in Title X upon state acceptance of similar limitations on use of state funds, regardless of state policy. And the rules construct obstacles to the states' separate funding of balanced counseling and referral services which cannot be justified by the need for separate accounting for grant funds. Therefore, the amended regulations are unconstitutional under *South Dakota v. Dole,* 483 U.S. 203 (1987).

CONCLUSION

For all the foregoing reasons, the Court should grant the Writ of Certiorari sought by Petitioners.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General

RITA S. EPPLER
Chief, Federal Litigation Section
(Counsel of Record)

JACK DECKER
Assistant Attorney General

APPENDIX A

	(A) Total Women	(B) Women at or below 150% of poverty	(C) 1990 Title X Award	(D) Non-Title X	(E) State	(F) MCH Block	(G) Total Columns (C) - (G)
Ohio Dept. of Health	87,787	73,137	$2,932,323	$3,219,015	$431,000	$275,000	$6,857,338
Federation For Community Planning (Cleveland)	28,685	27,369	1,017,761	1,232,863	126,500	-0-	2,377,124
Planned Parenthood Summit, Portage and Medina Counties	15,051	13,490	525,230	1,518,763	55,000	-0-	2,098,993
Planned Parenthood Central Ohio	10,543	9,054	435,770	1,064,230	33,000	-0-	1,533,000
Totals	142,066	123,050	$4,911,084	$7,034,871	$645,500	$275,000	$12,866,455
			38.17%	54.68%	5.02%	2.14%	100%

Notes:

A. Total women provided family planning services through Title X activities

B. The number of women in Column A whose incomes are at or below 150% of the federal poverty guidelines.

C. Non-Title X includes first, second and third party reimbursement such as patient fees, insurance and Medicaid as well as agency operating funds.

D. The totals reflect funds that are subject to Title X regulations.

Nos. 89-1391, 1392

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DR. IRVING RUST, ET AL., *Petitioners*,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services, *Respondent*.

THE STATE OF NEW YORK, ET AL., *Petitioners*,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services, *Respondent*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

Attorneys for Petitioners The State of New York, et al.

ROBERT ABRAMS
Attorney General of the State of New York
120 Broadway
New York, New York 10271
(212) 341-2240

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General

SUZANNE M. LYNN*
Assistant Attorney General
Chief, Civil Rights Bureau

Attorneys for Petitioners Rust, et al.

LAURENCE H. TRIBE
KATHLEEN M. SULLIVAN
1525 Massachusetts Avenue
Cambridge, MA 02138

RACHAEL N. PINE*
JANET BENSHOOF
LYNN PALTROW
KATHRYN KOLBERT
STEVEN R. SHAPIRO
LOUISE MELLING
ROBIN ABRAMS
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800 ext. 520

**Counsel of Record*

PETITIONS FOR CERTIORARI FILED MARCH 1, 1990
CERTIORARI GRANTED MAY 29, 1990

Attorneys for Petitioners
The State of New York, et al.

DONNA DENNIS
CYNTHIA F. KRUESI
SANFORD M. COHEN
Assistant Attorneys General

VICTOR A. KOVNER
Corporation Counsel
for the City of New York
100 Church Street
New York, New York 10007
(212) 374-3171

LEONARD J. KOERNER
LORNA BADE GOODMAN
GAIL RUBIN
PAMELA DOLGOW
Assistant Corporation Counsels

Attorneys for Petitioners
Rust, et al.

NORMAN SIEGEL
ARTHUR EISENBERG
New York Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 382-0557

Of Counsel:

ROGER K. EVANS
Planned Parenthood Action
Fund, Inc.
810 Seventh Avenue
New York, New York 10019
(212) 541-7800

LAURIE R. ROCKETT
Hollyer, Jones, Brady, Smith,
Troxell, Barrett & Chira
342 Madison Avenue
New York, New York 10173
(212) 818-1110

Attorney for Respondent Sullivan

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2201

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SUBCHAPTER VIII -- POPULATION RESEARCH AND VOLUNTARY FAMILY PLANNING PROGRAMS

§ 300. Project grants and contracts for family planning services

(a) Authority of Secretary

The Secretary is authorized to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents). To the extent practical, entities which receive grants or contracts under this subsection shall encourage family participation in projects assisted under this subsection.

(b) Factors determining awards; establishment and preservation of rights of local and regional entities

In making grants and contracts under this section the Secretary shall take into account the number of patients to be served, the extent to which family planning services are needed locally, the relative need of the applicant, and its capacity to make rapid and effective use of such assistance. Local and regional entities shall be assured the right to apply for direct grants and contracts under this section, and the Secretary shall by regulation fully provide for and protect such right.

(c) Authorization of appropriations

For the purpose of making grants and contracts under this section, there are authorized to be appropriated $30,000,000 for the fiscal year ending June 30, 1971; $60,000,000 for the fiscal year ending June 30, 1972; $111,500,000 for the fiscal year ending June 30, 1973; $111,500,000 each for the fiscal years ending June 30, 1974 and June 30, 1975; $115,000,000 for fiscal year 1976; $115,000,000 for the fiscal year ending September 30, 1977; $136,400,000 for the fiscal year ending September 30, 1978; $200,000,000 for the fiscal year ending September 30, 1979; $230,000,000 for the fiscal year ending September 30, 1980; $264,500,000 for the fiscal year ending September 30, 1981; $126,510,000 for the fiscal year ending September 30, 1982; $139,200,000 for the fiscal year ending September 30, 1983; and $150,830,000 for the fiscal year ending September 30, 1984.

* * * *

§ 300a. Formula grants to States for family planning services

(a) Authority of Secretary; prerequisites

The Secretary is authorized to make grants, from allotments made under subsection (b) of this section, to State health authorities to assist in planning, establishing, maintaining, coordinating, and evaluating family planning services. No grant may be made to a State health authority under this section unless such authority has submitted, and had approved by the Secretary, a State plan for a coordinated and comprehensive program of family planning services.

(b) Factors determining amount of State allotments

The sums appropriated to carry out the provisions of this section shall be allotted to the States by the Secretary on the basis of the population and the financial need of the respective States.

(c) "State" defined

For the purposes of this section, the term "State" includes the Commonwealth of Puerto Rico, the Northern Mariana Islands, Guam, American Samoa, the Virgin Islands, the District of Columbia, and the Trust Territory of the Pacific Islands.

(d) Authorization of appropriations

For the purpose of making grants under this section, there are authorized to be appropriated $10,000,000 for the fiscal year ending June 30, 1971; $15,000,000 for the fiscal year ending June 30, 1972; and $20,000,000 for the fiscal year ending June 30, 1973.

* * * *

§ 300a-1. Training grants and contracts; authorization of appropriations

(a) The Secretary is authorized to make grants to public or nonprofit private entities and to enter into contract with public or private entities and individuals to provide the training for personnel to carry out family planning service programs described in section 300 or 300a of this title.

(b) For the purpose of making payments pursuant to grants and contracts under this section, there are authorized to be appropriated $2,000,000 for the fiscal year ending June 30, 1971; $3,000,000 for the fiscal year ending June 30, 1972; $4,000,000 for the fiscal year ending June 30, 1973; $3,000,000 each for the fiscal years ending June 30, 1974, and June 30, 1975; $4,000,000 for fiscal year 1976; $5,000,000 for the fiscal year ending September 30, 1977; $3,000,000 for the fiscal year ending September 30, 1978; $3,100,000 for the fiscal year ending September 30, 1979; $3,600,000 for the fiscal year ending September 30, 1980; $4,100,000 for the fiscal year ending September 30, 1981; $2,920,000 for the fiscal year ending September 30. 1982; $3,200,000 for the fiscal year ending September 30, 1983; and $3,500,000 for the fiscal year ending September 30, 1984.

* * * *

§ 300a-2. Conduct, etc., of research activities

The Secretary may --

(1) conduct, and

(2) make grants to public or nonprofit private entities and enter into contracts with public or private entities and individuals for projects for, research in the biomedical, contraceptive development, behavioral, and program implementation fields related to family planning and population.

* * * *

§ 300a-3. Informational and educational materials development grants and contracts; authorization of appropriations

(a) The Secretary is authorized to make grants to public or nonprofit private entities and to enter into contracts with public or private entities and individuals to assist in developing and making available family planning and population growth information (including educational materials) to all persons desiring such information (or materials).

(b) For the purpose of making payments pursuant to grants and contracts under this section, there are authorized to be appropriated $750,000 for the fiscal year ending June 30, 1971; $1,000,000 for the fiscal year ending June 30, 1972; $1,250,000 for the fiscal year ending June 30, 1973; $909,000 each for the fiscal years ending June 30, 1974, and June 30, 1975; $2,000,000 for fiscal year 1976; $2,500,000 for the fiscal year ending September 30, 1977; $600,000 for the fiscal year ending September 30, 1978; $700,000 for the fiscal year ending September 30, 1979; $805,000 for the fiscal year ending September 30, 1980; $926,000 for the fiscal year ending September 30, 1981; $570,000 for the fiscal year ending September 30, 1982; $600,000 for the fiscal year ending September 30, 1983; and $670,000 for the fiscal year ending September 30, 1984.

* * * *

§ 300a-4. Grants and contracts

(a) Promulgation of regulations governing execution; amount of grants

Grants and contracts made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate. The amount of any grant under any section of this subchapter shall be determined by the Secretary; except that no grant under any such section for any program or project for a fiscal year beginning after June 30, 1975, may be made for less than 90 per centum of its costs (as determined under regulations of the Secretary) unless the grant is to be made for a program or project for which a grant was made (under the same section) for the fiscal year ending June 30, 1975, for less than 90 per centum of its costs (as so determined), in which case a grant under such section for that program or project for a fiscal year beginning after that date may be made for a percentage which shall not be less than the percentage of its costs for which the fiscal year 1975 grant was made.

(b) Payment of grants

Grants under this subchapter shall be payable in such installments and subject to such conditions as the Secretary may determine to be appropriate to assure that such grants will be effectively utilized for the purposes for which made.

(c) Prerequisites; "low-income family" defined

A grant may be made or contract entered into under section 300 or 300a of this title for a family planning service project or program only upon assurances

satisfactory to the Secretary that --

(1) priority will be given in such project or program to the furnishing of such services to persons from low-income families; and

(2) no charge will be made in such project or program for services provided to any person from a low-income family except to the extent that payment will be made by a third party (including a government agency) which is authorized or is under legal obligation to pay such charge.

For purposes of this subsection, the term "low-income family" shall be defined by the Secretary in accordance with such criteria as he may prescribe so as to insure that economic status shall not be a deterrent to participation in the programs assisted under this subchapter.

(d) Suitability of informational or educational materials

(1) A grant may be made or a contract entered into under section 300 or 300a-3 of this title only upon assurances satisfactory to the Secretary that informational or educational materials developed or made available under the grant or contract will be suitable for the purposes of this subchapter and for the population or community to which they are to be made available, taking into account the educational and cultural background of the individuals to whom such materials are addressed and the standards of such population or community with respect to such materials.

(2) In the case of any grant or contract under section 300 of this title, such assurances shall provide for the review and approval of the suitability of such materials, prior to their distribution, by an advisory committee established by the grantee or contractor in accordance with the Secretary's regulations. Such a

committee shall include individuals broadly representative of the population or community to which the materials are to be made available.

* * * *

§ 300a-5. Voluntary participation by individuals; participation not prerequisite for eligibility or receipt of other services and information

The acceptance by any individual of family planning services or family planning or population growth information (including educational materials) provided through financial assistance under this subchapter (whether by grant or contract) shall be voluntary and shall not be a prerequisite to eligibility for or receipt of any other service or assistance from, or to participation in, any other program of the entity or individual that provided such service or information.

* * * *

§ 300a-6. Prohibition against funding programs using abortion as family planning method

None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.

* * * *

§ 300a-6a. Plans and reports

(a) Submission of report to Congress; purposes of plan

Not later than seven months after the close of each fiscal year, the Secretary shall make a report to the Congress setting forth a plan to be carried out over the next five fiscal years for --

(1) extension of family planning services to all persons desiring such services,

(2) family planning and population research programs,

(3) training of necessary manpower for the programs authorized by this subchapter and other Federal laws for which the Secretary has responsibility and which pertain to family planning, and

(4) carrying out the other purposes set forth in this subchapter and the Family Planning Services and Population Research Act of 1970.

(b) Minimum requirements for plan

Such a plan shall, at a minimum, indicate on a phased basis --

(1) the number of individuals to be served by family planning programs under this subchapter and other Federal laws for which the Secretary has responsibility, the types of family planning and population growth information and educational materials to be developed under such laws and how they will be made available, the research goals to be reached under such laws, and the manpower to be trained under such laws;

(2) an estimate of the costs and personnel requirements needed to meet the purposes of this subchapter and other Federal laws for which the

Secretary has responsibility and which pertain to family planning programs; and

(3) the steps to be taken to maintain a systematic reporting system capable of yielding comprehensive data on which service figures and program evaluations for the Department of Health and Human Services shall be based.

(c) Contents of report

Each report submitted under subsection (a) of this section shall --

(1) compare results achieved during the preceding fiscal year with the objectives established for such year under the plan contained in the previous such report;

(2) indicate steps being taken to achieve the objectives during the fiscal years covered by the plan contained in such report and any revisions to plans in previous reports necessary to meet these objectives; and

(3) make recommendations with respect to any additional legislative or administrative action necessary or desirable in carrying out the plan contained in such report.

* * * *

Title X, Public Health Service Act, 42 U.S.C.A. §§ 300-300a-7 (West Supp. 1990)

SUBCHAPTER VIII -- POPULATION RESEARCH AND VOLUNTARY FAMILY PLANNING PROGRAMS

§ 300. Project grants and contracts for family planning services

[See main volume for text of (a) and (b)]

(c) Reduction of grant amount

The Secretary, at the request of a recipient of a grant under subsection (a) of this section, may reduce the amount of such grant by the fair market value of any supplies or equipment furnished the grant recipient by the Secretary. The amount by which any such grant is so reduced shall be available for payment by the Secretary of the costs incurred in furnishing the supplies or equipment on which the reduction of such grant is based. Such amount shall be deemed as part of the grant and shall be deemed to have been paid to the grant recipient.

(d) Authorization of appropriations

For the purpose of making grants and contracts under this section, there are authorized to be appropriated $30,000,000 for the fiscal year ending June 30, 1971; $60,000,000 for the fiscal year ending June 30, 1972; $111,500,000 for the fiscal year ending June 30, 1973; $111,500,000 each for the fiscal years ending June 30, 1974 and June 30, 1975; $115,000,000 for fiscal year 1976; $115,000,000 for the fiscal year ending September 30, 1977; $136,400,000 for the fiscal year ending

September 30, 1978; $200,000,000 for the fiscal year ending September 30, 1979; $230,000,000 for the fiscal year ending September 30, 1980; $264,500,000 for the fiscal year ending September 30, 1981; $126,510,000 for the fiscal year ending September 30, 1982; $139,200,000 for the fiscal year ending September 30, 1983; $150,830,000 for the fiscal year ending September 30, 1984; and $158,400,000 for the fiscal year ending September 30, 1985.

* * * *

§ 300a-1. Training grants and contracts: authorization of appropriations

[See main volume for text of (a)]

(b) For the purpose of making payments pursuant to grants and contracts under this section, there are authorized to be appropriated $2,000,000 for the fiscal year ending June 30, 1971; $3,000,000 for the fiscal year ending June 30, 1972; $4,000,000 for the fiscal year ending June 30, 1973; $3,000,000 each for the fiscal years ending June 30, 1974, and June 30, 1975; $4,000,000 for fiscal year 1976; $5,000,000 for the fiscal year ending September 30, 1977; $3,000,000 for the fiscal year ending September 30, 1978; $3,100,000 for the fiscal year ending September 30, 1979; $3,600,000 for the fiscal year ending September 30, 1980; $4,100,000 for the fiscal year ending September 30, 1981, $2,920,000 for the fiscal year ending September 30. 1982; $3,200,000 for the fiscal year ending September 30, 1983; $3,500,000 for the fiscal year ending September 30, 1984; and $3,500,000 for the fiscal year ending September 30, 1985.

* * * *

§ 300a-3. Informational and educational materials development grants and contracts; authorization of appropriations

[See main volume for text of (a)]

(b) For the purpose of making payments pursuant to grants and contracts under this section, there are authorized to be appropriated $750,000 for the fiscal year ending June 30, 1971; $1,000,000 for the fiscal year ending June 30, 1972; $1,250,000 for the fiscal year ending June 30, 1973; $909,000 each for the fiscal years ending June 30, 1974, and June 30, 1975; $2,000,000 for fiscal year 1976; $2,500,000 for the fiscal year ending September 30, 1977; $600,000 for the fiscal year ending September 30, 1978; $700,000 for the fiscal year ending September 30, 1979; $805,000 for the fiscal year ending September 30, 1980; $926,000 for the fiscal year ending September 30, 1981; $570,000 for the fiscal year ending September 30, 1982; $600,000 for the fiscal year ending September 30, 1983; $670,000 for the fiscal year ending September 30, 1984; and $700,000 for the fiscal year ending September 30, 1985.

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§ 300a-4. Grants and contracts

[See main volume for text of section]

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§ 300a-6. Prohibition against funding programs using abortion as family planning method

* * * *

§ 300a-7. Sterilization or abortion

(a) Omitted

(b) Prohibition of public officials and public authorities from imposition of certain requirements contrary to religious beliefs or moral convictions

The receipt of any grant, contract, loan or loan guarantee under the Public Health Service Act [42 U.S.C.A. § 201 et seq.], the Community Mental Health Centers Act [42 U.S.C.A. § 2689 et seq.], or the Developmental Disabilities Services and Facilities Construction Act [42 U.S.C.A. § 6000 et seq.] by any individual or entity does not authorize any court or any public official or other public authority to require --

(1) such individual to perform or assist in the performance of any sterilization procedure or abortion if the performance of such procedure or abortion if his performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions; or

(2) such entity to --

(A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or

(B) provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the

performance or assistance in the performance of such procedures or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.

(c) Discrimination prohibition

(1) No entity which receives a grant, contract, loan, or loan guarantee under the Public Health Service Act [42 U.S.C.A. § 201 et seq.], the Community Mental Health Centers Act [42 U.S.C.A. § 2689 et seq.], or the Developmental Disabilities Services and Facilities Construction Act [42 U.S.C.A. § 6000 et seq.] after June 18, 1973 may --

(A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or

(B) discriminate in the extension of staff or other privileges to any physician or other health care personnel,

because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.

(2) No entity which receives after July 12, 1974, a grant or contract for biomedical or behavioral research under any program administered by the Secretary of

Health and Human Services may --

(A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or

(B) discriminate in the extension of staff or other privileges to any physician or other health care personnel,

because he performed or assisted in the performance of any lawful health service or research activity, because he refused to perform or assist in the performance of any such service or activity on the grounds that his performance or assistance in the performance of such service or activity would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting any such service or activity.

(d) Individual rights respecting certain requirements contrary to religious beliefs or moral convictions

No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.

(e) Prohibition on entities receiving Federal grant, etc. from discriminating against applicants for training or study because of refusal of applicant to participate on religious or moral grounds

No entity which receives, after September 29, 1979, any grant, contract, loan, loan guarantee, or interest subsidy under the Public Health Service Act [42 U.S.C.A. § 201 et seq.], the Community Mental Health Centers Act [42 U.S.C.A. § 2689 et seq.], or the Developmental Disabilities Assistance Bill of Rights Act [42 U.S.C.A. § 6000 et seq.] may deny admission or otherwise discriminate against any applicant (including applicants for internships and residencies) for training or study because of the applicant's reluctance, or willingness, to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations contrary to or consistent with the applicant's religious beliefs or moral convictions.

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Regulations Governing Grants for Family Planning Services, 36 Fed. Reg. 18465 (1971)

Subpart A -- Project Grants for Family Planning Services

* * * *

§ 59.5 Project requirements

An approvable application must contain each of the following unless the Secretary determines that the applicant has established good cause for its omission:

(a) Assurances that:

(1) Services will be made available without the imposition of any durational residence or referral requirement;

(2) Services will be made available without regard to religion, creed, age, sex, parity, or marital status;

(3) Services will be made available in such a manner as to protect the dignity of the individual;

(4) Priority in the provision of services will be given to persons from low-income families;

(5) No charge will be made for services provided to any person from a low income family except to the extent that payment will be made by a third party (including a Government agency) which is authorized or is under legal obligation to pay such charge. In such case, effort must be made to obtain such third party payments. Where the cost of services is to be reimbursed under title XIX of the Social Security Act, a written agreement with the title XIX agency is required. Reimbursement may be either to the project or in lieu thereof directly to the provider in accordance with the above referred to written agreement. Charges to be

made for services to persons other than those from low income families must be in accordance with a schedule submitted and approved as part of the project plan;

(6) Family planning medical services will be performed under the direction of a physician with special training or experience in family planning;

(7) All services purchased for project participants will be authorized by the Project Director or his designee on the project staff;

(8) Services provided will be solely on a voluntary basis and shall not be a prerequisite to eligibility for or receipt of any other service or assistance from, or to participation in, any other programs of the applicant; and

(9) The project will not provide abortions as a method of family planning.

(b) A description of how persons broadly representative of all elements of the population to be served and others in the community knowledgeable about such needs have been given an opportunity to participate in the development of the project and will be given an opportunity to participate in the implementation and evaluation of such project.

(c) Provision for pre- and in-service training for all project personnel.

(d) Provision for medical services related to family planning including physician's consultation, examination, prescription, continuing supervision, laboratory examination, contraceptive supplies, and necessary referral to other medical facilities when medically indicated.

(e) Provision for social services related to family planning, including counseling, referral to and from other social and medical services agencies, and such ancillary services as are necessary to facilitate clinic attendance.

(f) Provision for the effective usage of contraceptive devices and practices.

(g) Provision for use of a broad range of medically approved methods of family planning including the rhythm method.

(h) Provision for diagnostic and treatment services for infertility.

(i) Provision for coordination and use of referral arrangements with other providers of health care services, with local health and welfare departments, hospitals, and voluntary agencies, and health services projects supported by other Federal programs.

(j) Provision for informational and educational programs designed to achieve community understanding of the objectives of the program, to inform the community of the availability of services, and to promote continuing participation in the project by persons to whom family planning services may be beneficial.

(k) In those cases in which the project will provide family planning services by contract or other similar arrangement with the actual providers of services, a plan shall be provided establishing rates and methods of payment for medical care. Such payments must be made pursuant to agreements with a schedule of rates and payment procedures maintained by the grantee. The grantee must be prepared to substantiate that rates are reasonable and necessary.

(l) A description of the standards and qualifications which will be required for personnel (including the project director) and facilities utilized in the various aspects of carrying out the project plan.

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Regulations Governing Grants For Family Planning Services, 42 C.F.R. §§ 59.1-59.13 (1986)

PART 59 -- GRANTS FOR FAMILY PLANNING SERVICES

Subpart A -- Project Grants for Family Planning Services

AUTHORITY: Sec. 6(c), 84 Stat. 1507, 42 U.S.C. 300a-4; sec. 6(c), 84 Stat. 1506, 42 U.S.C. 300.

SOURCE: 45 FR 37436, June 3, 1980, unless otherwise noted.

§ 59.1 To what programs do these regulations apply?

The regulations of this subpart are applicable to the award of grants under section 1001 of the Public Health Service Act (42 U.S.C. 300) to assist in the establishment and operation of voluntary family planning projects. These projects shall consist of the educational, comprehensive medical, and social services necessary to aid individuals to determine freely the number and spacing of their children.

§ 59.2 Definitions.

As used in this subpart:

"Act" means the Public Health Service Act, as amended.

"Family" means a social unit composed of one person, or two or more persons living together, as a household.

"Low income family" means a family whose total annual income does not exceed 100 percent of the most

recent Community Services Administration Income Poverty Guidelines (45 CFR 1060.2). "Low-income family" also includes members of families whose annual family income exceeds this amount, but who, as determined by the project director, are unable, for good reasons, to pay for family planning services. For example, unemancipated minors who wish to receive services on a confidential basis must be considered on the basis of their own resources.

"Nonprofit," as applied to any private agency, institution, or organization, means that no part of the entity's net earnings benefit, or may lawfully benefit, any private shareholder or individual.

"Secretary" means the Secretary of Health and Human Services and any other officer or employee of the Department of Health and Human Services to whom the authority involved has been delegated.

"State" means one of the 50 States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa, Northern Marianas, or the Trust Territory of the Pacific Islands.

[45 FR 37436, June 3, 1980, as amended at 48 FR 3614, Jan. 26, 1983; 49 FR 38118, Sept. 27, 1984]

§ 59.3 Who is eligible to apply for a family planning services grant?

Any public or nonprofit private entity in a State may apply for a grant under this subpart.

§ 59.4 How does one apply for a family planning services grant?

(a) Application for a grant under this subpart shall be made on an authorized form.

(b) An individual authorized to act for the applicant and to assume on behalf of the applicant the obligations imposed by the terms and conditions of the grant, including the regulations of this subpart, must sign the application.

(c) The application shall contain --

(1) A description, satisfactory to the Secretary, of the project and how it will meet the requirements of this subpart;

(2) A budget and justification of the amount of grant funds requested;

(3) A description of the standards and qualifications which will be required for all personnel and for all facilities to be used by the project; and

(4) Such other pertinent information as the Secretary may require.

§ 59.5 What requirements must be met by a family planning project?

(a) Each project supported under this part must:

(1) Provide a broad range of acceptable and effective medically approved family planning methods (including natural family planning methods) and services (including infertility services and services for adolescents). If an organization offers only a single method of family planning, such as natural family planning, it may participate as part of a project as long as the entire project offers a broad range of family planning services.

(2) Provide services without subjecting individuals to any coercion to accept services or to employ or not to employ any particular methods of family planning. Acceptance of services must be solely on a voluntary basis and may not be made a prerequisite to eligibility for, or receipt of, any other service, assistance from or

participation in any other program of the applicant.[1]

(3) Provide services in a manner which protects the dignity of the individual.

(4) Provide services without regard to religion, race, color, national origin, handicapping condition, age, sex, number of pregnancies, or marital status.

(5) Not provide abortions as a method of family planning.

(6) Provide that priority in the provision of services will be given to persons from low-income families.

(7) Provide that no charge will be made for services provided to any person from a low-income family except to the extent that payment will be made by a third party (including a Government agency) which is authorized to or is under legal obligation to pay this charge.

(8) Provide that charges will be made for services to persons other than those from low-income families in accordance with a schedule of discounts based on ability to pay, except that charges to persons from families whose annual income exceeds 250 percent of the levels set forth in the most recent CSA Income Poverty Guidelines (45 CFR 1060.2) will be made in accordance with a schedule of fees designed to recover the reasonable cost of providing services.

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[1] Section 205 of Pub. L. 94-63 states: "Any (1) officer or employee of the United States, (2) officer or employee of any State, political subdivision of a State, or any other entity, which administers or supervises the administration of any program receiving Federal financial assistance, or (3) person who receives, under any program receiving Federal assistance, compensation for services, who coerces or endeavors to coerce any person to undergo an abortion or sterilization procedure by threatening such person with the loss of, or disqualification for the receipt of, any benefit or service under a program receiving Federal financial assistance shall be fined not more than $1,000 or imprisoned for not more than one year, or both."

(9) If a third party (including a Government agency) is authorized or legally obligated to pay for services, all reasonable efforts must be made to obtain the third-party payment without application of any discounts. Where the cost of services is to be reimbursed under title XIX or title XX of the Social Security Act, a written agreement with the title XIX or title XX agency is required.

(10)(i) Provide that if an application relates to consolidation of service areas or health resources or would otherwise affect the operations of local or regional entities, the applicant must document that these entities have been given, to the maximum feasible extent, an opportunity to participate in the development of the application. Local and regional entities include existing or potential subgrantees which have previously provided or propose to provide family planning services to the area proposed to be served by the applicant.

(ii) Provide an opportunity for maximum participation by existing or potential subgrantees in the ongoing policy decisionmaking of the project.

(11) Provide for an Advisory Committee as required by § 59.6.

(b) In addition to the requirements of paragraph (a) of this section, each project must meet each of the following requirements unless the Secretary determines that the project has established good cause for its omission. Each project must:

(1) Provide for medical services related to family planning (including physician's consultation, examination prescription, and continuing supervision, laboratory examination, contraceptive supplies) and necessary referral to other medical facilities when medically indicated, and provide for the effective usage of contraceptive devices and practices.

(2) Provide for social services related to family

planning, including counseling, referral to and from other social and medical service agencies, and any ancillary services which may be necessary to facilitate clinic attendance.

(3) Provide for informational and educational programs designed to (i) achieve community understanding of the objectives of the program, (ii) inform the community of the availability of services, and (iii) promote continued participation in the project by persons to whom family planning services may be beneficial.

(4) Provide for orientation and in-service training for all project personnel.

(5) Provide services without the imposition of any durational residency requirement or requirement that the patient be referred by a physician.

(6) Provide that family planning medical services will be performed under the direction of a physician with special training or experience in family planning.

(7) Provide that all services purchased for project participants will be authorized by the project director or his designee on the project staff.

(8) Provide for coordination and use of referral arrangements with other providers of health care services, local health and welfare departments, hospitals, voluntary agencies, and health services projects supported by other Federal programs.

(9) Provide that if family planning services are provided by contract or other similar arrangements with actual providers of services, services will be provided in accordance with a plan which establishes rates and methods of payment for medical care. These payments must be made under agreements with a schedule of rates and payment procedures maintained by the grantee. The grantee must be prepared to substantiate that these rates are reasonable and necessary.

(10) Provide, to the maximum feasible extent, an opportunity for participation in the development, implementation, and evaluation of the project by persons broadly representative of all significant elements of the population to be served, and by others in the community knowledgeable about the community's needs for family planning services.

(Sec. 215, Public Health Service Act, 58 Stat. 690, 42 U.S.C. 216; sec. 1006(a), Public Health Service Act, 84 Stat. 1507, 42 U.S.C. 300a - 4(a); sec. 931(b)(1) of Pub. L. 97-35, 95 Stat. 570, 42 U.S.C. 300(a)) [45 FR 37436, June 3, 1980, as amended at 49 FR 38118, Sept. 27, 1984]

§ 59.6 What procedures apply to assure the suitability of informational and educational material?

(a) A grant under this section may be made only upon assurances satisfactory to the Secretary that the project shall provide for the review and approval of informational and educational materials developed or made available under the project by an Advisory Committee prior to their distribution, to assure that the materials are suitable for the population or community to which they are to be made available and the purposes of title X of the Act. The project shall not disseminate any such materials which are not approved by the Advisory Committee.

(b) The Advisory Committee referred to in paragraph (a) of this section shall be established as follows:

(1) *Size.* The Committee shall consist of no fewer than five but no more than nine members, except that this provision may be waived by the Secretary for good cause shown.

(2) *Composition.* The Committee shall include individuals broadly representative (in terms of demographic factors such as race, color, national origin, handicapped condition, sex, and age) of population or community for which the materials are intended.

(3) *Function.* In reviewing materials, the Advisory Committee shall:

(i) Consider the educational and cultural backgrounds of individuals to whom the materials are addressed;

(ii) Consider the standards of the population or community to be served with respect to such materials;

(iii) Review the content of the material to assure that the information is factually correct;

(iv) Determine whether the material is suitable for the population or community to which it is to be made available; and

(v) Establish a written record of its determinations.

§ 59.7 What criteria will the Department of Health and Human Services use to decide which family planning services projects to fund and in what amount?

(a) Within the limits of funds available for these purposes, the Secretary may award grants for the establishment and operation of those projects which will in the Department's judgment best promote the purposes of section 1001 of the Act, taking into account:

(1) The number of patients and, in particular, the number of low-income patients to be served;

(2) The extent to which family planning services are needed locally;

(3) The relative need of the applicant;

(4) The capacity of the applicant to make rapid and effective use of the Federal assistance;

(5) The adequacy of the applicant's facilities and staff;

(6) The relative availability of non-Federal resources within the community to be served and the degree to which those resources are committed to the project; and

(7) The degree to which the project plan adequately provides for the requirements set forth in these regulations.

(b) The Secretary shall determine the amount of any award on the basis of his estimate of the sum necessary for the performance of the project. No grant may be made for less than 90 percent of the project's costs, as so estimated, unless the grant is to be made for a project which was supported, under section 1001, for less than 90 percent of its costs in fiscal year 1975. In that case, the grant shall not be for less than the percentage of costs covered by the grant in fiscal year 1975.

(c) No grant may be made for an amount equal to 100 percent of the project's estimated costs.

§ 59.8 How is a grant awarded?

(a) The notice of grant award specifies how long HHS intends to support the project without requiring the project to recompete for funds. This period, called the project period, will usually be for 3 to 5 years.

(b) Generally the grant will initially be for 1 year and subsequent continuation awards will also be for 1 year at a time. A grantee must submit a separate application to have the support continued for each subsequent year. Decisions regarding continuation awards and the funding level of such awards will be made after consideration of such factors as the grantee's progress and management practices, and the availability

of funds. In all cases, continuation awards require a determination by HHS that continued funding is in the best interest of the Government.

(c) Neither the approval of any application nor the award of any grant commits or obligates the United States in any way to make any additional, supplemental, continuation, or other award with respect to any approved application or portion of an approved application.

§ 59.9 For what purpose may grant funds be used?

Any funds granted under this subpart shall be expended solely for the purpose for which the funds were granted in accordance with the approved application and budget, the regulations of this subpart, the terms and conditions of the award, and the applicable cost principles prescribed in Subpart Q of 45 CFR Part 74.

§ 59.10 What other HHS regulations apply to grants under this subpart?

Attention is drawn to the following HHS Department-wide regulations which apply to grants under this subpart: These include:

42 CFR Part 50, Subpart D -- Public Health Service grant appeals procedure
42 CFR Part 122, Subpart E -- Health Systems Agency review of certain proposed uses of Federal health funds
45 CFR Part 16 -- Procedures of the Departmental Grant Appeals Board
45 CFR Part 19 -- Limitations on payment or reimbursement for drugs
45 CFR Part 74 -- Administration of grants

45 CFR Part 80 -- Nondiscrimination under programs receiving Federal assistance through the Department of Health and Human Services effectuation of Title VI of the Civil Rights Act of 1964
45 CFR Part 81 -- Practice and procedure for hearings under Part 80 of this Title
45 CFR Part 84 -- Nondiscrimination on the basis of handicap in programs and activities receiving or benefiting from Federal financial assistance
45 CFR Part 91 -- Nondiscrimination on the basis of age in HHS programs or activities receiving Federal financial assistance

[49 FR 38116, Sept. 27, 1984]

§ 59.11 Confidentiality.

All information as to personal facts and circumstances obtained by the project staff about individuals receiving services must be held confidential and must not be disclosed without the individual's consent, except as may be necessary to provide services to the patient or as required by law, with appropriate safeguards for confidentiality. Otherwise, information may be disclosed only in summary, statistical, or other form which does not identify particular individuals.

§ 59.12 Inventions or discoveries.

(a) A project grant award is subject to the regulations of HHS as set forth in 45 CFR Parts 6 and 8, as amended. These regulations shall apply to any activity of the project for which grant funds are used, whether the activity is part of an approved project or is an unexpected byproduct of that project.

(b) The grantee and the Secretary shall take

appropriate measures to assure that no contracts, assignments, or other arrangements inconsistent with the grant obligation are continued or entered into and that all personnel involved in the grant activity are aware of and comply with such obligations.

§ 59.13 Additional conditions.

The Secretary may, with respect to any grant, impose additional conditions prior to or at the time of any award, when in the Department's judgment these conditions are necessary to assure or protect advancement of the approved program, the interests of public health, or the proper use of grant funds.

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Memorandum from Joel M. Mangel, Deputy Assistant General Counsel, to Louis M. Hellman, M.D., Deputy Assistant Secretary for Population Affairs (Apr. 20, 1971)

MEMORANDUM

TO : Louis M. Hellman, M.D.
Deputy Assistant Secretary for Population Affairs

FROM : Joel M. Mangel
Deputy Assistant General Counsel
Division of Public Health Grants and Services

SUBJECT : Abortion as a Method of Family Planning--Section 1008 of the Public Health Service Act

You have orally asked us the following questions:

1. May a grant under Title X of the PHS Act, added by the Family Planning Services and Population Research Act of 1970, be made to an organization which, in addition to the provision of preventive family planning services, also provides, without Federal support, as part of its activities, abortion services as a method of family planning?

2. May grants under Title X be made to support research into fertility control methods which may prove to work in the manner of abortifacients?

3. May grants under Title X be made for the collection of data relating to the subject of abortion, for example a study of its effectiveness as a method of family planning?

Section 1008 of the Act provides:

> "None of the funds appropriated under this title [Title X] shall be used in programs where abortion is a method of family planning."

Although not entirely free from doubt, read literally the phrase "programs where abortion is a method of family planning," most reasonably limits the prohibition contained in section 1008 to the financial support of programs in which abortions are provided as a method of family planing.

However, because section 1008 is somewhat unclear and susceptible of other interpretations, we think that the legislative history of this provision is relevant to consideration of the questions presented.

The most significant expression of Congressional intent in this connection is contained in the Conference Report accompanying S. 2108, which contains the following statement:

> "It is, and has been, the intent of both Houses that the funds authorized under this legislation be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities. The conferees have adopted the language contained in section 1008, which prohibits the use of such funds for abortion, in order to make clear this intent. The legislation does not and is not intended to interfere with or limit programs conducted in accordance with State or local laws and regulations which are supported by funds other than those authorized under this legislation."[1] (Emphasis added.)

In addition, Congressman John D. Dingell made the following statement on the floor of the House:

> "Mr. Speaker, I support the legislation before this body. I set forth in my extended remarks the reasons why I offered the amendment which prohibited abortion as a method of family planning . . . .
>
> With the 'prohibition of abortion' the committee members clearly intended that abortion is not to be encouraged or promoted in any way through this legislation. Programs which include abortion as a method of family planning are not eligible for funds allocated through this Act."[2] (Emphasis added.)

Thus, it is apparent that the Congressional intent was to prohibit a broader scope of activity than a literal reading of section 1008 would require. In this light, our responses are as follows:

1. May a grant under Title X of the PHS Act be made to an organization which in addition to the

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[1] Conference Report No. 91-1667, Dec. 3, 1970, at pg. 8-9.

[2] Cong. Rec., Nov. 16, 1970, p. H. 10286 (daily edition).

provision of preventive family planning services, also provides, without Federal support, as part of its activities, abortion services as a method of family planning?

We do not believe that the word "program," as used in section 1008, was intended to be so comprehensive as to include any and all family planning activities carried on by an applicant for Title X funds. For example, we do not believe that a hospital offering abortions for family planning purposes, consonant with state law, would be disqualified from receiving Title X funds for the operation of a separate family planning program which utilized only preventive family planning methods. While the term "program" is not defined in the Act, the above quoted language of the Conference Report, stating that section 1008 was not "intended to interfere with or limit programs conducted in accordance with State or local laws" supported by other than Title X funds, is consistent with the view we have taken. It is recognized that in some situations, the abortion element in a program of family planning services may bulk so large and be so intimately related to all aspects of the program as to make it difficult, if not impossible to separate the eligible and non-eligible items of cost. In such a case, we think a grant for the project would be legally questionable.

2. May grants under Title X of the PHS Act be made to support research into fertility control methods which may prove to work in the manner of abortifacients?

As we understand the facts giving rise to this question, there are a number of substances which are under investigation for purposes of developing a means to control fertility. At present, the mode of action of

these substances is not entirely understood. After research it may be established that some of these substances act in the mode of an abortifacient. Your question is, in effect, whether faced with such a possibility, you may nevertheless undertake such fertility research.

We do not think that the statute or legislative history prohibits such research. In fact, the legislative history is replete with references to the need for research into methods of fertility control[3] including the " . . . screening and synthesis of new antifertility compounds."[4] To hold that such research could not be performed merely because of the possibility that there may be an abortifacient reaction would seem to run contrary to that expression of intention.

3. May grants under Title X of the PHS Act be made for the collection of data relating to the subject of abortion, for example a study of its effectiveness as a method of family planning?

As we have already indicated, inasmuch as the collection of data does not itself involve the provision of abortions, section 1008 would not, from a literal reading appear applicable.

While the collection of the data would thus appear legally supportable, the use of the data to promote or encourage abortions, even if such use is supported by non-Federal funds, may raise policy questions as to the data collection project. Representative Dingell's

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[3] House Report No. 91-1472, Sept. 26, 1970, at pg. 10.

[4] Senate Report No. 91-1004, July 7, 1970, at pg. 11.

statement, quoted earlier, indicates that is was the intention of section 1008 to assure that "abortion is not to be encouraged or promoted in any way." Thus, the collection of data or the provision of information which may be used for such purpose, while not legally prohibited, may however be considered as inconsistent with this "non-encouragement" policy.

National Center for Family Planning Services, Health Services and Mental Health Administration, Department of Health, Education, and Welfare, *A Five-Year Plan for the Delivery of Family Planning Services* (Oct. 1971)

* * * *

In addition to specific contraceptive services, programs should make available other related medical examinations and tests to assist in the early detection of illness and disease. While the program cannot provide full medical care because of its specialized nature, services should be provided for the screening and referral, including followup, of the patient to appropriate physicians, hospitals or other programs for necessary treatment. This mechanism is vital, given the fact that family planning is often the point of entry into a fragmented health care system for many individuals.

Effective interrelationships with the total health care system for the benefit of the patient also requires that the project provide orientation in family planning to the personnel of other health and social service programs which are, or may become sources of referral, such as hospital emergency rooms, outpatient clinics, drug rehabilitation programs, VD clinics, abortion clinics, and welfare programs.

* * * *

There is no Federal policy concerning abortion, although many states have moved recently to liberalize their abortion laws. The concern of the Department of Health, Education, and Welfare is that "whatever changes in the laws are effected, they must insure two

principles: 1) safety of the patient, and 2) elimination of social and economic discrimination."* The use of funds authorized under the Family Planning Services and Population Research Act of 1970 to pay for abortion as a method of family planning is prohibited. Within the context of family planning service programs, abortions are not viewed as a method of fertility control, but as a service that should be available in accordance with local laws only in the event of a human or contraceptive method failure.

As an indication of the extent to which many people are not presently able to adequately control their fertility through contraceptive means, it has been estimated that in 1967 there were over 800,000 induced abortions in the United States.** As the best possible methods of fertility control are made more accessible and more widely used, the incidence of abortion should decrease. Abortion would then serve as a backup measure for contraceptive failure, thereby still further assuring the freedom of choice of those who do not desire an unwanted birth.

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* J. Veneman, Letter to Senator Robert Packwood (R-Oregon), May 18, 1970.

** J. Abernathy, B. Greenberg and D. Horowitz, "Estimates of Induced Abortions in Urban North Carolina, Demography, 7:1, February 1970.

Memorandum from Joel M. Mangel, Deputy Assistant General Counsel, to Louis M. Hellman, M.D., Deputy Assistant Secretary for Population Affairs (Jan. 18, 1973)

OFFICE OF THE GENERAL COUNSEL

January 18, 1973

Louis M. Hellman, M.D.
Deputy Assistant Secretary for
Population Affairs

Joel M. Mangel
Deputy Assistant General Counsel
for Public Health

Family Planning--Section 1008, PHS Act--Prohibition of Abortion--Distribution of Film Version of the Report of the Commission on Population Growth and the American Future

You have asked our opinion as to whether funds appropriated for use under section 1005 of the Public Health Service Act may be used to distribute the film referred to above, in light of the prohibition in section 1008 of the Act against using any funds appropriated under Title X "in programs where abortion is a method of family planning."[1] At the outset, we would like to point out that this memorandum deals only with the film in question and does not purport to pass on the question of whether distribution of the report in its entirety would violate section 1008.

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[1] Section 1008, Public Health Service Act.

There is no question that section 1005[2] provides ample authority for the award of grants or contracts designed to disseminate family planning and population growth information. Furthermore, we believe that the film version of the Commission's report qualifies as informational material appropriate for distribution under that section.

Your concern arises out of the fact that among the many things discussed in the film is the issue of abortion, in the course of which various views on abortion are presented, and that on page 37 of the film script there appears the following statement:

> "After considerable deliberation, the majority of the Commission decided that abortion should not be a crime in any state where performed within a specified time period and under medically safe conditions."

For the reasons discussed below, we do not believe that section 1008 prohibits the distribution of the film in question by the inclusion of the above discussed segment on abortion.

As we have previously advised you, the scope of the section 1008 prohibition is somewhat ambiguous.

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[2] Section 1005 authorizes the Secretary "to make grants to public or nonprofit private entities and to enter into contracts with public or private entities and individuals to assist in developing and making available family planning and population growth information (including educational materials) to all persons desiring such information (or materials)."

In our memorandum of April 20, 1971,[3] we advised that:

> "read literally the phrase 'programs where abortion is a method of family planning,' most reasonably limits the prohibition contained in section 1008 to the financial support of programs in which abortions are provided as a method of family planning."

On the other hand, we pointed out that Congressman Dingell, in explaining his purpose for proposing the amendment, stated:

> "With the 'prohibition of abortion' the committee members clearly intended that abortion is not to be encouraged or promoted in any way through this legislation. Programs which include abortion as a method of family planning are not eligible for funds allocated through this Act."[4]

Nevertheless, with regard to the collection of data relating to abortion, we went on to say that:

> "While the collection of the data would ... appear legally supportable, the use of the data to promote or encourage abortions, even if such use is supported by non-Federal funds, may

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[3] Memo, GH (Mangel to DASPA (Hellman), "Abortion as a Method of Family Planning--Section 1008 of the Public Health Service Act," 4/20/71, DF #38B.

[4] Id. at 3, quoting from Cong. Rec., Nov. 16, 1970, p. H.10286 (daily edition).

raise policy questions as to the data collection project." (Emphasis added.)[5]

While the Dingell statement introduces an additional element into the consideration of the section 1008 prohibition (i.e., "nonencouragement"), we continue to believe that it does not legally require the extension of the section 1008 prohibition beyond the literal impact of that section to the collection and dissemination of information.

However, even if we were to assume, arguendo, that the section 1008 prohibition extended to informational programs, we do not believe that it would prohibit distribution of the film.

Section 1008 prohibits the expenditure of Title X funds in programs in which abortion is a method of family planning. Even Congressman Dingell's statement, fairly read, addresses the abortion issue within the context of family planning.[6] Furthermore, the authority of the Secretary to expend funds in the field of abortion (other than as a method of family planning) is specifically recognized in the Conference Report accompanying the FY 1972 Appropriation Act, in which it is stated:

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[5] Id. at 2.

[6] In introducing his remarks, Congressman Dingell said: "I set forth in my extended remarks the reasons why I offered the amendment which prohibited abortion as a method of family planning ..." (emphasis added). Cong. Rec., Nov. 16, 1970, p. H10286 (daily edition). But cf. Conference Report, No. 91-1667, Dec. 3, 1970, at pp. 8-9.

"The Committee of Conference is agreed that in the population research, the prohibition in Title X of abortion as a method of family planning should not be construed so as to prevent scientific research into the causes of abortion and its effects."[7]

Thus, the purpose[8] of the Commission in making its recommendation is important not only to determine whether it is an "encouragement" of abortion but also whether it is an "encouragement" to use abortion as "a method of family planning."

Although the film does contain the above quoted recommendation, that State criminal penalties for abortion under the stated circumstances be repealed, the recommendation is followed by a clear statement that resort to abortion reflects a failure on the part of the family planning systems in the United States.[9] In fact, it is stated by the narrator of the film that:

"The Commission in making its recommendation that abortion laws be liberalized along the lines

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[7] H.R. Rep. No. 92-461, 92d Cong., 1st Sess. 8 (1971).

[8] Memo, GH (Goodman) to DASPA (Hellman), "Expenditure of Title X Funds for Research Dealing with Abortion--Effect of Section 1008, Public Health Service Act," 10/5/72, DF #38B. In that memorandum, we concluded that the purpose of the research, not the possible use to which some people might put the results, is the determining factor.

[9] "However, resort to abortion reflects a failure, because it means that the woman and man involved were not educated to birth control methods, or that they were legally or economically prohibited from obtaining birth control services." Film script, pp. 37-38.

> of the 1971 New York State Law, said that it was in no way advocating abortion as a substitute for family planning (emphasis added).[10]

Thus, the film specifically states that the Commission does not advocate abortion as a method of family planning, but recognizes it as a symbol of the failure of family planning. A close reading of the film script indicates that the Commission addressed the abortion issue in terms of legal prohibitions because it considered it to be a matter of personal rights and population control, but that it did not promote abortion as a means which government should support as a method of family planning.[11]

But even if the Commission's recommendation be taken as one which "encourages or promotes" abortion,[12] it clearly does not encourage abortion as a method of family planning.

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[10] Id. at 42.

[11] Id. at 37-44.

[12] While the Commission's purpose is stated in terms of "social [illegible]" and "woman's freedom of choice," it is arguable that [illegible] "encourage of promote" abortion.

United States Department of Health, Education, and Welfare, *Program Guidelines For Project Grants For Family Planning Services* (Jan. 1976)

INTRODUCTION

* * * *

Medical services in relation to family planning comprise the various aspects of health care given when a patient seeks advice or treatment for the control of reproduction. Such medical services should be part of a comprehensive medical care plan where patients served by a family planning project may receive education, advice, and referral for the screening, detection, prevention, or treatment of a variety of conditions with the objective of achieving and maintaining a state of good health, particularly with regard to reproduction. All patients desiring family planning advice or techniques should be given information, methods, or medication consistent with sound medical judgement and compatible with the personal convictions of the patient. Medical services must be administered in conformity with State and Federal statutes pertaining to medical practice. Delivery of medical services at family planning facilities will be the responsibility of physicians who have the training and/or experience to perform the required services.

* * * *

(d) Medical services related to family planning must include physician's consultation, examination, prescription, and continuing supervision; laboratory examination; contraceptive supplies; and necessary referral to other medical facilities when medically

indicated. Applicants and grantees are advised to familiarize themselves with the regulations governing sterilization, 42 CFR, Part 50, Subpart B, which are applicable to programs or projects supported in whole or in part with Federal funds. (See Appendix C.)

(e) Provision for social services related to family planning, including counseling, referral to and from other social and medical services agencies, and such ancillary services as are necessary to facilitate clinic attendance.

(f) Provision for the effective usage of contraceptive devices and practices.

(g) Provision for use of a broad range of medically approved methods of family planning including natural family planning methods.

(h) Provision for diagnostic and treatment services for infertility.

(i) Provision for coordination and use of referral arrangements with other providers of health care services, with local health and welfare departments, hospitals, and voluntary agencies, and health services projects supported by other Federal programs.

(j) Provision for informational and educational programs designed to achieve community understanding of the objectives of the program, to inform the community of the availability of services, and to promote continuing participation in the project by persons to whom family planning services may be beneficial.

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Patients who are pregnant and have received DES should be warned of the potential hazard (including vaginal adenosis and vaginal cancer) to any female offspring, and advised of the option of pregnancy termination.

• • • •

The IUD is a relatively safe and effective means of contraception. Questions have come up, however, about the safety of the IUD for women who become pregnant with the device in place. Patients should be advised as follows:

(1) If the menstrual period is late, or if pregnancy is suspected, the patient should be checked by her physician.

(2) If pregnancy is proven, the IUD should be removed if this can be done easily. Removal of the IUD early in pregnancy prevents serious complications from occurring and reduces the possibility of miscarriage.

(3) If the IUD is not removed, the patient should know there is an increased risk of infected abortion occurring when pregnancy is allowed to continue. The patient and her physician should discuss whether it is best to terminate or to continue the pregnancy.

(4) If a pregnancy is allowed to continue, whether or not the IUD is removed, the patient should be followed very closely by the physician for early signs of complications.

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POST-EXAMINATION INTERVIEW (EXIT INTERVIEW)

Following the physical examination and the selection of a family planning method, the patient should have an interview with an appropriately trained member of the health team for an interpretation of the clinical findings. The interviewer should be able to answer the patient's questions competently, courteously, and quickly, and give the patient understandable information. The following should be covered during the interview:

• • • •

(h) Give pregnancy counseling, when appropriate.

• • • •

(j) Make appropriate referrals for any needed services not furnished through the facility. (Such referrals should be followed-up by the project.)

• • • •

RETURN VISIT SERVICES AND FOLLOW-UP

• • • •

(a) • • •

(2) • • •

f. Advise patient that if she becomes pregnant with the IUD in place, there is risk of septic abortion. In such cases, if the IUD string is visible and the IUD can easily be removed, this should be done, and arrange-

ments for follow-up and/or referral should be made immediately. If the IUD cannot be removed, the patient should be advised of the option of pregnancy termination. Whatever the decision regarding the pregnancy, she must have close medical supervision.

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Memorandum from Office of the General Counsel, Department of Health, Education, and Welfare (April 14, 1978) (Attachment B to *Amicus* Brief of the Secretary of Health and Human Services, *Valley Family Planning v. North Dakota*, 661 F.2d 99 (8th Cir. 1981) (No. 80-1471))

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE
OFFICE OF THE GENERAL COUNSEL

Elsie Sullivan, Assistant for
Information and Education
Office for Family Planning, BCHS
Senior Attorney
Public Health Division

Section 1008, PHS Act--Permissible Activities by Grantees.

You have orally requested our views as to what abortion-related activities a grantee of funds under Title X of the Public Health Service Act may conduct, in light of the prohibition of § 1008 of the Act:

> "None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning."

Specifically, you question whether a Title X grantee may, consistent with § 1008, do the following:

1. Supply information to those who do not want to continue their pregnancies, and may be interested in obtaining abortions.

2. Refer clients to doctors to obtain abortions.

3. Inspect abortion facilities to see if they meet national Planned Parenthood guidelines.

4. Provide speakers to debate in opposition to "Right to Life", anti-abortion speakers.

5. Advocate the need and suitability of abortion in the community.

6. Produce and/or show movies that tend to encourage and promote a favorable attitude toward abortion.

7. Provide abortion as a suitable back-up method of family planning.

8. Bring legal action to liberalize statutes relating to abortion and state it "would refer clients to physicians for abortions and would offer services to assist clients in procuring abortions ..."

9. Bring pressure on a local Board of Supervisors to change its relatively restrictive abortion policy at the county hospital.

10. Counsel women, especially, those not 18 years of age, to cry "rape" to obtain abortions at the county hospital.

11. Be a dues paying participant in a national federation whose five year plan relative to family planning includes as its purpose to provide leadership in (among other things) abortion, whose stated objective is the

"reaffirming and protecting the legitimacy of induced abortion as a necessary back-up to contraceptive failure, and extending safe, dignified services to women who seek them; whose basic service program elements include "Abortion Services (or local referral)".

This office has traditionally taken the view that § 1008 not only prohibits the provision by Title X grantees of abortion as a method of family planning as part of the Title X-supported program, but also prohibits activities which promote or encourage the use of abortion as a method of family planning by the Title X-supported program.[1] Under this view, the provision of information concerning abortion services, mere referral of an individual to another provider of services for an abortion,[2] and the collection of statistical data and information regarding abortion[3] are not considered to be proscribed by § 1008. The provision of "pregnancy counselling" in the sense of encouraging persons to obtain abortions[4]

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[1] GH (Mangel to DASPA (Hellman), "Abortion as a Method of Family Planning--Section 1008 of the Public Health Service Act" (4/20/71).

[2] GH (Conrad) to DASPA (Hellman), "Contract for Research on Natural Family Planning--Provision of Abortion" (11/5/77).

[3] GH (Mangel) to DASPA (Hellman), "Family Planning--Section 1008, PHS Act--Prohibition of Abortion--Distribution of the Film Version of the Report of the Commission on Population Growth and the American Future" (1/18/73); GH (Goodman) to DASPA (Hellman), "Expenditures of Title X Funds for Scientific Research Dealing with Abortion--Effect of Section 1008, Public Health Service Act" (10/5/72).

[4] GH (Mangel) to RAX (Young), "Interpretation of Section 1008 of the Public Health Service Act, et al." (5/31/73).

and the provision of transportation to persons to enable them to obtain abortions, on the other hand, are considered to be proscribed by § 1008.[5] The test to be applied, then, appears to be whether the immediate effect of the activity in question is to encourage or promote the use of abortion as a method of family planning. If the immediate effect of the activity is essentially neutral as in the cases of mere referral or collection of statistical date,[6] then the activity does not fall afoul of § 1008. If the immediate effect of the activity is to encourage or assist in procuring an abortion as in the case of "pregnancy counselling" or providing transportation to obtain an abortion,[7] on the other hand, it falls afoul of § 1008. Applying this test to the activities described in the first paragraph, we draw the following conclusions:

1. Items 1 and 2[8] above may, as discussed in the preceding paragraph, be conducted by the Title X-supported program. See opinion cited at footnote 2.

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[5] GH (Mangel) to OFO (Landerbaugh), "Review of Correspondence from Region IX Involving OEO transferred Grant" (4/10/73).

[6] For example, the compilation of statistical data can be used by both proponents and opponents of abortion; in a mere referral, the person making the referral does not present the medical or other arguments for or against obtaining an abortion.

[7] Clearly, the provision of "pregnancy counselling" and transportation services promote the immediate use of abortion as a method of family planning.

[8] We read item 2 as meaning "mere referral," that is, the provision to a patient of the name, address and/or telephone number of a provider of services, without further affirmative action to secure the services of that provider.

2. Items 4 through 10 above all clearly involve various forms of advocacy of abortion as a method of family planning, and cannot be conducted as part of the Title X-supported program.

3. The effect of item 3 above is unclear. While it could be argued that there is no purpose to a facility inspection except as a basis for subsequently encouraging persons to use it, we do not think this is necessarily so. For example, a grantee may routinely inspect provider facilities to which it may make referrals to determine their suitability for the provision of services. The inspection itself clearly has no effect; it is the actions subsequently taken as a result of the inspection that may promote or encourage abortion. We are inclined to view item 3 as analogous to the collection of abortion data and information and thus not falling afoul of §1008, assuming of course that the grantee does not subsequently use the information gained as a result of the inspection to "encourage" abortions.

4. With regard to item 11 above, we think that membership in the national organization does not necessarily imply sufficient commitment to the abortion-related goals and activities of the national organization to be proscribed by §1008, as long as there are other legitimate program-related reasons for the affiliation (such as access to data or information useful to the Title X-supported program).

The thrust of your questions illustrates the importance of

a point we have made in the past but which, in the case of the grantee or grantees in question here, may have been overlooked. Specifically, where a Title X grantee also conducts other activities which are not part of the grant-supported program and would not be permissible under the statute if they were part of the program, the grantee must ensure that the Title X-support program is separate and distinguishable from those other activities. Separate bookkeeping entries are not enough.[9] As we have previously observed:

> "... in some situations, the abortion element in a program of family planning services may bulk so large and be so intimately related to all aspects of the program as to make it difficult, if not impossible to separate the eligible and noneligible items of cost. In such a case, we think a grant for the project would be legally questionable."[10]

Accordingly, we suggest that the grant or grants giving rise to your questions be carefully reviewed to make sure that any abortion-related activities the grantees may be conducting are separate and distinct from the Title X-supported program.

Carol C. Conrad

cc: Mr. Beattie, OGC
Ms. Martin, OPA
Dr. Martin, BCHS

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[9] Op. cit., memorandum of 4/10/73.

[10] Op. cit., memorandum of 4/20/71.

Memorandum From Department of Health, Education, and Welfare (July 25, 1979) (Attachment A to *Amicus* Brief of the Secretary of Health and Human Services, *Valley Family Planning v. North Dakota*, 661 F.2d 99 (8th Cir. 1981) (No. 80-1471))

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Elsie Sullivan
Staff Assistant
Office for Family Planning
Bureau of Community Health Services

Senior Attorney
Public Health Division

§ 1008, PHS Act - 42 CFR 59.5(d) - Abortion Referrals - DF 38B

You have orally requested our view as to whether a grantee under Title X of the Public Health Service Act is required to refer persons to other health care providers who might provide abortions.[1] In our view a grantee is not required by the statute or regulations to make such referrals, except in the limited circumstances discussed below.

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[1] As we understand the question, the project would be involved in these abortion decisions only to the extent of providing the patient with information about the existence of a provider who might provide an abortion. In any such referral, the provider to whom the patient is referred will, of course, be exercising his or her own professional judgment as to the advisability of performing an abortion.

Your question arises out of a section of the Title X regulations, 42 CFR 59.5, which provides in pertinent part as follows:

> "An approvable project must contain each of the following unless the Secretary determines that the applicant has established good cause for its omission:
>
> * * * * *
>
> (d) Provision for medical services related to family planning including ... necessary referral to other medical facilities when medically indicated."

Also relevant to your question are § 1008 of the Act, and § 401(b) of Pub. L. 93-45, the so-called "conscience clause." (Those statutory provisions are set out below.) Your question, therefore, has three aspects: (1) Does § 59.5(d) by its terms require referrals to providers who might recommend or provide abortions? (2) Would requiring the making of such referrals fall afoul of § 1008? (3) Would requiring the making of such referrals fall afoul of the "conscience clause"? Our views follow.

Scope of § 59.5(d)

By its terms, the only referrals which are required under § 59.5(d) are those which are "necessary" because they are "medically indicated." Under this language, the test becomes one of medical judgment as to whether medical care not available from the project is indicated. Thus, there is clearly no requirement that a project make an "abortion referral" (i.e., make a referral specifically to have an abortion performed), since in the final analysis that decision rests with the patient and the person or entity to whom the patient is referred. Moreover, there

is clearly no requirement that referral be made in a case in which, in the judgment of the project's professional staff, a referral to other sources is not medically indicated. Just as clearly, however, § 59.5(d) requires referral to a provider who might recommend or provide an abortion in cases where such a referral is necessary because of the patient's medical condition or the condition of the fetus. For example, cases where continuance of the pregnancy would endanger the mother's life would fall in the latter category. Hence, while § 59.5(d) does not require a project to make referrals to abortion providers in all cases, a project could not - consistent with § 59.5(d) - refuse as a matter of policy to make such referrals in any case, regardless of the medical indications therefor.

§ 1008 PHS Act

Having concluded that § 59.5(d) requires referrals to providers who might provide abortions in some (but not all) cases (i.e., where such referrals are deemed necessary by project medical staff because of medical indications), the question becomes does this requirement conflict with § 1008? We think it does not. Section 1008 prohibits the use of Title X funds "in programs where abortion is a method of family planning." As we have previously advised,[2] a project may, consistent with § 1008, make "mere referrals" for abortion, as long as it does not then go on to promote or encourage use of the procedure for family planning purposes. We see no

[2] Memorandum, GH (Conrad) to DASPA (Hellman), "Contract for Research on Natural Family Planning - Provision of Abortion" (11/5/75); Memorandum GH (Conrad) to DF # 38B, "Revised Draft of Response to Mears' Letter Telephoned to Dr. Hellman's Office" (7/29/75).

reason why requiring the making of such referrals under the limited circumstances described above should change this result. Indeed, we think that where such a referral is necessary because of medical indications, abortion is not being considered as a method of family planning at all, but rather as a medical treatment possibly required by the patient's condition. As such, it would not come within the scope of § 1008 at all, since that section reaches only cases which relate to the use of abortion "as a method of family planning."

"Conscience Clause"

Section 401(b) of Pub. L. 93-45 provides, as pertinent here, as follows:

> "(b) The receipt of any grant ... under the Public Health Service Act ... by any entity does not authorize any ... public official ... to require -
>
> * * * * *
>
> (2) such entity to -
>
> (A) make its facilities available for the performance of such ... abortion if the performance of such ... abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or
>
> (B) provide any personnel for ... assistance in the performance of any ... abortion if the ... assistance in the performance of such ... abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel."

With respect to the "conscience clause", the question becomes whether requiring referrals under the limited circumstances described above contravenes this provision. By its terms § 401(b)(2) establishes only two limitations on the Secretary's authority to regulate grantee activities: (1) he cannot require a grantee to make its facilities available for the performance of abortions, and (2) he cannot require a grantee to require its personnel to perform or assist in the performance of abortions if doing so conflicts with the beliefs of those individuals. For the reasons given below, we do not believe that the referrals described above come within the prohibition of either § 401(b)(2)(A) or § 401(b)(2)(B).

It is clear that requiring a grantee to make referrals to providers of abortions does not fall afoul of the first limitation (§ 401(b)(2)(A)), since that subsection only covers the "performance of an abortion" by assisted facilities. The term "performance of an abortion" would not ordinarily be read as encompassing mere referrals, but would ordinarily mean performance of the operation itself. There is nothing in the legislative history to suggest that the term "performance" should be given other than its natural scope.

Thus, if the requirement of § 59.5(d) falls afoul of anything, it can only be the second limitation, § 401(b)(2)(B). However, we do not believe that requiring referrals where abortion appears medically indicated falls afoul of this limitation either. First, requiring referrals to providers who may provide abortions is at most requiring "assistance in the performance of an abortion" within the meaning of the statute. However, the legislative history suggests on balance that the type of "assistance" envisioned was that which would be provided by support personnel in the course of the operation itself

-- e.g., nursing. See, for example, the remarks of Sen. Long in a colloquy with Sen. Church, the sponsor of the Senate bill:

> "Mr. Long. If I understand what the Senator is saying, he is saying that a nurse or an attendant who has religious feelings contrary to ... abortion should ... and would not be required ... to participate in any such procedure ....
>
> "Mr. Church. That is correct." 119 Cong. Rec. 9597 (3/27/78).

Second, § 401(b)(2)(B) only restricts the Secretary from requiring grantees to require their employees to act contrary to the beliefs those employees hold as individuals; it does not restrict the Secretary from requiring grantees to act contrary to the beliefs the grantees hold as institutions. This difference becomes quite clear when subparagraphs (A) and (B) are read together: subparagraph (A) relates to *institutional* beliefs, while subparagraph (B) refers only to the beliefs of the institution's personnel. Under standard rules of statutory construction, since Congress explicitly covered institutional beliefs in subparagraph (A) and omitted covering them in subparagraph (B), it must be assumed to have intended not to cover them in the latter subparagraph.[3] Thus, if a grantee is staffed by personnel whose

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[3] Sutherland, Statutory Construction, (Sands, 4th ed.) § 47.23.

This interpretation is supported by the rejection of the Senate language, which would have made no distinction between the requirements applying to institutions and those applying to individuals:

(continued...)

beliefs do not permit them to make referrals under the above circumstances, the grantee may be required under § 59.5(d) to hire persons whose beliefs will not preclude them from making such referrals, and such a requirement does not conflict with § 401(b)(2).

If you have any questions on the above, please do not hesitate to contact us.

Carol C. Conrad

Prepared by: CConrad:lsm: 7/16/79: Y2006: 4A-53

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[3] (...continued)

"... there shall not be imposed, applied, or enforced ... any requirement ... which would result in ... causing ... any physician, or health care personnel, or any hospital or other health care institution to ... assist in the performance of, any abortion ... if the performance of such abortion ... would be contrary to the religious beliefs of such physician or other health care personnel, or the person or group sponsoring or administering such hospital or other institution." 119 Cong. Rec. 9595 (3/27/73).

See Sutherland, supra, at § 48.18.

The discussion on the floor of the House of the House language ultimately adopted as § 401(b) is ambiguous, but contains support for this reading of the statute. For example, Rep. Loland, a co-sponsor of the House language, summarized its provisions as follows:

> "This section 401 provides that receipt of financial assistance ... does not constitute a ... basis for (an) ... administrative order requiring an individual to aid in performing (an) ... abortion ....
>
> "Nor does receipt of financial assistance provide legal authority for (an) ... administrative order requiring the provision of personnel or facilities by any entity for the performance of ... abortion ...". 119 Cong. Rec. 17454 (5/31/73) (Emphasis added).

United States Department of Health, Education, and Welfare, *Program Guidelines For Project Grants For Family Planning Services* (1981)

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8.3 HISTORY, PHYSICAL ASSESSMENT, AND LABORATORY TESTING

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- Physical Assessment

Female clients requesting prescriptive methods of contraception (e.g., oral contraceptives, IUDs, diaphragms) must have a general physical examination at the initial medical visit. The initial examination should include at least the following:

> *--Height; weight; blood pressure; thyroid; hear; lungs; extremities; breasts, including instruction in self-exam; abdomen; pelvic examination, including visualization of the cervix and bimanual exam; rectal exam, as indicated.*

For oral contraceptive users, initial and annual physical examinations must include evaluation of weight, blood pressure, extremities, breasts, and pelvic organs. For IUD users, initial and annual physical exam, blood pressure, and pelvic exam are required, and a more complete exam is recommended.

Female clients using nonprescriptive methods or diaphragms should have a general physical examination at least every two years. This exam is particularly important for clients

who are not receiving general health care elsewhere.

* * * *

9.0 Recommended Services

Since the services contained in this section are important to reproductive health care, it is recommended that they be provided at individual service sites.

9.1 GONORRHEA SCREENING

In community or client populations with a high incidence of gonorrhea, endocervical cultures for gonorrhea should be performed on each female client at the time of the initial pelvic examination and repeated as indicated. A yield of equal to or greater than 4 percent positive cultures merits universal screening

For additional guidance, see Appendices -- Sexually Transmitted Diseases.

9.2 MINOR GYNECOLOGIC PROBLEMS

Family planning programs should provide for the diagnosis and treatment of minor gynecologic problems so as to avoid fragmentation or lack of medical care for clients with these conditions. Problems such a vaginitis or urinary tract infection may be amenable to on-the-spot diagnosis and treatment, following microscopic examination of vaginal secretions or urine.

9.3 GENETIC SCREENING AND REFERRAL

For clients at risk for transmission of genetic abnormalities, some basic effort to define this risk is a logical component of family pla ing services. Initial genetic screening and referral services should be offered to clients who are in need of such services.

Initial screening consists of a careful family history of the client and the client's partner. More complete genetic screening and counseling may be offered *directly* (by a genetic counselor who functions in association with a clinical genetic team capable of providing comprehensive services for a broad range of genetic disorders) or *indirectly* (through referral to a comprehensive genetic service program or programs which may be federally, State, or privately funded). In either case, linkages with a comprehensive genetic service program should be established, specifically with clinical genetic services centers.

Where feasible, in-service training in genetics should be arranged for project staff to enable them to provide simple genetic screening. Training may be appropriately provided by a genetic service program to which the project is linked. The purpose of training is to familiarize staff with the indications for genetic services, referral mechanisms, and resources. Literature and informational materials regarding the availability of genetic services, including but not limited to prenatal diagnosis, should be available in the appropriate langauge to all clients on request.

When genetic screening services are

offered by a project, they must (1) be supported by a program of public information and education which is sensitive to the concerns of local ethnic and religious groups and upholds the dignity of individual s with congenital physical or mental limitations, (2) include education and counseling to all clients on a voluntary basis, and (3) include referral for testing or further screening if indicated.

For additional guidance, see Appendices -- Genetic Screening.

9.4 HEALTH PROMOTION/DISEASE PREVENTION

For many clients, family planning programs are their only continuing source of health information and medical care. Therefore, while most of the client services will necessarily relate to fertility regulation, family planning programs should, whenever possible, provide health maintenance services such as screening, immunization, and general health education and counseling directed toward health promotion and disease prevention. These additional services should promote the clients' general state of health and, in turn, the health of their infants and children. Programs are therefore encouraged to assess the health problems prevalent among the populations they serve and to develop services to address them.

Nutrition services are an example of an important activity directed toward promoting health and preventing disease which can be integrated into the existing family planning services. Projects should provide nutritional

problem identification, basic nutrition information, screening, and medical care to clients at high risk of nutrition problems or those requiring nutritional management of disease. These services can be provided without the resources of a full-time nutritionist. Project staff can deliver such services with nutrition training and consultation with a qualified nutritionist.

For further information, see Appendices -- Health Promotion/Disease Prevention

* * * *

Memorandum from Nabers Cabaniss, Deputy Assistant Secretary for Population Affairs, to Regional Health Adminstrators (Dec. 8, 1987) (Exhibit G to Complaint, *Rust v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988) (No. 88-0702))

Date Dec. 8, 1987

From Nabers Cabaniss

Subject Office of Population Affairs Program Instruction Series OPA-87-4: AIDS Education, Counseling and Testing in Title X

To Regional Health Administrators
Regions I-X

Evidence suggests that an increasing number of women of childbearing age will become infected with Human Immunodeficiency Virus (HIV) either as a result of intravenous drug use or through heterosexual transmission of the virus. Title X provides family planning services to 4.3 million sexually active women annually. Most of these women are young (two-thirds below the age of 25), many are members of minority groups, and 85 percent are members of low income families. These characteristics of Title X clients closely resemble the characteristics of the population of women thought to be at high risk of HIV infection. Thus, Title X clinics represent appropriate settings to try to slow the spread of HIV infection.

All Title X clinics must offer, at a minimum, education on HIV infection and AIDS, counseling on risks and

infection prevention, and referral services. Other services such as risk assessment, counseling about testing and administering tests may also be provided. If other resources are unavailable, Title X funds may be used to support these services. Of particular importance is the role of Title X projects in offering effective methods of family planning to sexually active HIV-infected women who run a high risk of perinatal transmission in pregnancy and who run a significant risk of transmitting HIV to other sexual partners.

TERMS

The term HIV (Human Immunodeficiency Virus) refers to the virus which may infect persons and which causes AIDS.

The term AIDS (Acquired Immunodeficiency Syndrome) refers to the end-stage of HIV infection characterized by life-threatening or severely disabling diseases, e.g., serious infections, rare cancers, or neurological disorders.

In addition to AIDS, the spectrum of HIV infection includes an early stage without symptoms which may last several years and an intermediate symptomatic stage sometimes called ARC or AIDS-Related Complex. During all stages of HIV infection, the infected person can transmit the virus to others by sexual contact, contact with blood (including sharing of needles), or from mother to child during pregnancy or childbirth and perhaps by breast feeding.

In this program instruction, the term AIDS refers only to the end-stage of HIV infection; the term HIV infection will be used to refer to all other stages of the infection.

Counseling refers to the provision of information and education concerning HIV infection, its effects, high risk activities associated with it, and methods of prevention or risk reduction. Where testing is offered, counseling includes both pre and post test discussions with the client.

Risk Assessment refers to the process of identifying persons from among a larger client population who, because of their participation in high risk activities, symptoms, or expressed interest may be identified as high priority candidates for HIV testing.

Testing refers to administration and interpretation of both the ELISA and the Western Blot blood tests which indicate whether the client has antibodies to HIV and, therefore, (1) is infected with HIV, (2) can spread the infection to other persons, and (3) may eventually progress to AIDS.

STAFF TRAINING AND INFECTION CONTROL

Title X General Training and Nurse Practitioner Training programs have taken steps to increase their emphasis on training on HIV infection and AIDS. Clinic staff should be encouraged to participate in training provided by the Title X training program and other sources. Clinic staff should become familiar with the precautions contained in Recommendations for Prevention of HIV Transmission in Health Care Settings, issued by the Centers for Disease Control (CDC) on August 21, 1987. (copy enclosed)

Title X clinics are strongly encouraged to implement the practices recommended by CDC.

PREGNANCY

A woman who has tested positive for any infection should be carefully counseled on the risks pregnancy poses for her as well as for her baby. She should be offered effective methods to prevent both pregnancy and disease transmission as discussed above. For HIV-infected women choosing temporary methods of contraception, clinics should emphasize follow-up to insure continued access to and utilization of contraceptive services.

A client who participates in high risk activities should be told that, even if she has used condoms during sexual intercourse, she should stop all high risk activity and be tested for HIV infection before attempting to become pregnant. Testing should be delayed until at least 3 months after stopping all high risk activity to provide time for antibody formation necessary to insure validity of the test.

If already pregnant, a woman infected with HIV should be referred for appropriate medical care for herself and her infant. She should be provided counseling about the significant risks of perinatal transmission as well as transmission of the virus to her sexual partner(s).

American College of Obstetricians and Gynecologists, Statement of Policy, *Further Ethical Considerations In Induced Abortion* (1977)

* * * *

Pregnancies often involve medical, social and economic factors which impact adversely on the health of the woman; and while induced abortions may be one option in the management of such pregnancies, other alternatives may, in fact, be equally or even more appropriate in solving these problems. In order to preserve the values to which this document has referred, the following measures are recommended to ensure the availability of proper medical care and should apply to the needs of all women regardless of age or marital status:

* * * *

4. Provision of adequate and supportive counseling presenting the practical alternatives for the management of problem pregnancies. Counseling directed solely toward either promoting or preventing abortion does not sufficiently reflect the full nature of the problem or the range of options to which the patient is entitled. Appropriately balanced counseling, combined with the available and accessible facilities, provides the minimum base for the opportunity to make a truly informed choice.

* * * *

American College of Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services* (6th ed. 1985)

* * * *

FAMILY PLANNING

The physician should make available to patients information on reproductive physiology, methods of fertility control, and sterilization. Family planning services should be offered within a context of comprehensive counseling, including human sexuality and the prevention of sexually transmitted infections. Where appropriate, family planning services should be integrated into regular gynecologic care to allow continued observation.

Another aspect of family planning is preconceptional counseling. This can help determine the advisability and timing of pregnancy, assess and possibly stabilize risks, and reinforce good health and lifestyle habits that are conducive to pregnancy. This type of counseling before conception can help promote the well-being of the fetus during the first several weeks of gestation when a woman may not be aware she is pregnant.

A general medical and gynecologic history, with physical examination and appropriate laboratory studies, should be used to evaluate the relative or absolute contraindications to specific family planning methods for a particular patient. It is important to establish the level of the patient's knowledge about reproductive physiology and about her specific needs. She should be made aware of the availability, effectiveness, and relative risks of different methods. Conception control is the responsibility of both partners; both male and female methods should be considered.

The sexually active adolescent girl deserves special

attention because of the high incidence of unintended pregnancy in this population. The gynecologist should attempt to ensure that she has access to the most suitable methods of contraception.

In the event of an unwanted pregnancy, the physician should counsel the patient about her options of continuing the pregnancy to term and keeping the infant, continuing the pregnancy to term and offering the infant for legal adoption, or aborting the pregnancy. When possible, and with the patient's approval, the physician should offer this counseling to her partner and to her parents if she is a dependent adolescent, before these difficult decisions are made. If the patient elects abortion, she should be counseled for future reference that abortion is not recommended as a primary method of family planning. When pregnancy termination is recommended by the physician for medical or psychiatric indications, consultation may be appropriate.

* * * *

American Medical Association, *Current Opinions of the Council on Ethical and Judicial Affairs* (1986)

PREAMBLE:

The medical profession has long subscribed to a body of ethical statements developed primarily for the benefit of the patient. As a member of this profession, a physician must recognize responsibility not only to patients, but also to society, to other health professionals, and to self. The following Principles adopted by the American Medical Association are not laws, but standards of conduct which define the essentials of honorable behavior for the physician.

I. A physician shall be dedicated to providing competent medical service with compassion and respect for human dignity.

II. A physician shall deal honestly with patients and colleagues, and strive to expose those physicians deficient in character or competence, or who engage in fraud or deception.

III. A physician shall respect the law and also recognize a responsibility to seek changes in those requirements which are contrary to the best interests of the patient.

IV. A physician shall respect the rights of patients, of colleagues, and of other health professionals, and shall safeguard patient confidences within the constraints of the law.

V. A physician shall continue to study, apply and advance scientific knowledge, make relevant information available to patients, colleagues, and the public, obtain consultation, and use the talents of

other health professionals when indicated.

VI. A physician shall, in the provision of appropriate patient care, except in emergencies, be free to choose whom to serve, with whom to associate, and the environment in which to provide medical services.

VII. A physician shall recognize a responsibility to participate in activities contributing to an improved community.

* * * *

3.04 REFERRAL OF PATIENTS. A physician may refer a patient for diagnostic or therapeutic services to another physician, limited practitioner, or any other provider of health care services permitted by law to furnish such services, whenever he believes that this may benefit the patient. As in the case of referrals to physician-specialists, referrals to limited practitioners should be based on their individual competence and ability to perform the services needed by the patient. A physician should not so refer a patient unless he is confident that the services provided on referral will be performed competently and in accordance with accepted scientific standards and legal requirements. (V, VI)

* * * *

8.07 INFORMED CONSENT. The patient's right of self-decision can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. The patient should make his own determination on treatment. The physician's obligation is to present the medical facts accurately to the patient or to the individual responsible for his

care and to make recommendations for management in accordance with good medical practice. The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice. Informed consent is a basic social policy for which exceptions are permitted (1) where the patient is unconscious or otherwise incapable of consenting and harm from failure to treat is imminent; or (2) when risk-disclosure poses such a serious psychological threat of detriment to the patient as to be medically contraindicated. Social policy does not accept the paternalistic view that the physician may remain silent because divulgence might prompt the patient to forego needed therapy. Rational, informed patients should not be expected to act uniformly, even under similar circumstances, in agreeing to or refusing treatment. (I, II, III, IV, V)

* * * *

General Accounting Office, *Restrictions On Abortion And Lobbying Activities In Family Planning Programs Need Clarification* (Sept. 24, 1982)

REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES

Restrictions On Abortion And Lobbying Activities In Family Planning Programs Need Clarification

Some family planning grant recipients' practices raised questions as to whether they comply with restrictions on abortion-related activities, but there was no evidence that title X funds had been used to pay for abortions or to advise clients to have abortions. The Department of Health and Human Services (HHS) needs to set forth clear guidance on the scope of abortion restrictions in its title X program regulations and guidelines.

Even if this is done, title X recipients would still be allowed to carry out abortion activities--not with title X funds, but as a part of their overall activities by organizationally separating the title X family planning program. The Congress may want to clarify its intent if it does not want title x funds to go to organizations providing abortions.

Lobbying by recipients was generally not paid with title X program funds and therefore not subject to Federal lobbying restrictions. However, recipients incurred some expenses that raised questions as to adherence with Federal lobbying restrictions. HHS needs to make its guidance in this are more specific and consistent.

COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

The Honorable Orrin G. Hatch
Chairman, Committee on Labor
and Human Resources
United States Senate

The Honorable Jeremiah Denton
Chairman, Subcommittee on Aging,
Family and Human Services
Committee on Labor and Human Resources
United States Senate

In accordance with your September 8, 1981, request we have reviewed the family planning program authorized by title X of the Public Health Service Act to determine whether title X funds have been used to finance lobbying activities or to support abortion-related activities.

Comments were obtained only from the Department of Health and Human Services and not from individual grant recipients included in our review. In accordance with our policy, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from its issue date. At that time, we will send copies to the Secretary of Health and Human Services; the Director, Office of Management and Budget; other interested congressional Committees and Subcommittees; the grant recipients included in the review; and other interested parties.

Charles A. Bowker /s/

Comptroller General of the United States

REPORT BY THE
COMPTROLLER GENERAL
OF THE UNITED STATES

RESTRICTIONS ON ABORTION AND LOBBYING ACTIVITIES IN FAMILY PLANNING PROGRAMS NEED CLARIFICATION

DIGEST

Title X of the Public Health Service Act authorizes the Department of Health and Human Services (HHS) to make grants for a broad range of family planning services. Recipients of title X funds, however, are restricted from using program funds for abortions or certain abortion-related activities and for lobbying.

At the request of the Chairmen of the Senate Committee on Labor and Human Resources and the Senate Subcommittee on Aging, Family and Human Services, GAO reviewed the activities of selected title X grantees operating family planning clinics to determine whether title X funds were being used for such activities.

CLARIFICATION OF ABORTION RESTRICTIONS NEEDED

GAO found no evidence that title X funds had been used for abortions or to advise clients to have abortions. Since 1971, HHS has held that the restrictions of section 1008 prohibiting the use of title X funds "* * * in programs where abortion is a method of family planning" are applicable to only that part of a recipient's operation supported by title X. HHS' interpretation of section 1008 allows title X recipients to use non-title X funds to

carry out abortion-related activities which would not be allowed as part of the title X program, so long as the abortion activities are separated from the title X family planning services.

Thus, HHS' policy allows title X recipients to use organizational techniques to insulate the title X program from abortion activities prohibited by section 1008 and thereby not jeopardize their eligibility for title X funds. Because the distinction between the recipients' title X and other activities may not be easily recognized, the public can get the impression that Federal funds are being improperly used for abortion activities.

About 74 organizations receiving title X funds perform abortions at clinics colocated with family planning programs. Under HHS' policy, these agencies can organize family planning and abortion activities into separate programs and still comply with the HHS interpretation of section 1008.

Congressional guidance may be needed if the Congress does not want title X funds to go to organizations providing abortions.

FAMILY PLANNING CLINICS NEED FORMAL GUIDANCE ON ABORTION-RELATED MATTERS

HHS has traditionally held that section 1008 not only prohibits abortion as a method of family planning, but also prohibits activities which encourage, promote, or advocate abortion. These policies evolved from a series of HHS' legal opinions, but have never been set forth in regulations or guidelines--HHS' formal mechanisms through which policy is provided to grant recipients. In

addition, the legal opinions do not always reach clinics and sometimes "draw a fine line" between allowable and unallowable activities, thereby failing to provide clear guidance on abortion-related matters.

GAO reviewed the activities of 14 family planning clinics to determine whether title X funds were being used for abortion-related activities. Although only six clinics had received copies of the legal opinions, clinic staff who counsel title X clients generally said they were aware of HHS' abortion policy restrictions, and GAO found no indications that any women were advised or encouraged to have abortions. However, GAO found variations in clinic practices, some of which GAO believes are questionable in light of HHS' interpretation of section 1008. These include:

-- Counseling practices which do not present alternatives to abortion.

-- Abortion referral practices which may go beyond HHS' referral policy.

-- Using educational materials which present barrier methods of contraception with early abortion in case of failure as a method of family planning.

TITLE X RECIPIENTS NEED MORE SPECIFIC GUIDANCE ON LOBBYING

Using title X program funds for lobbying--attempting to influence legislation or appropriations pending before the Congress--is restricted by Federal appropriations laws, HHS' regulations and instructions, and the Office of Management and Budget's (OMB's) guidance. However, neither HHS nor OMB has specifically identified

activities that constitute lobbying. Also, Federal guidance setting forth restrictions on dues paid to organizations that lobby is inconsistent between public and other non-profit title X recipients.

All seven title X recipients reviewed for lobbying had incurred expenses that, in GAO's opinion, raised questions as to adherence with Federal restrictions. Two recipients lobbied, but GAO could not determine from their records whether program funds were used. Most lobbying expenditures of the other five recipients did not involve program funds and were therefore not subject to Federal restrictions. However, of these five

-- all used program funds to pay dues to organizations that lobby and

-- two used small amounts of program funds to lobby at the Federal and/or State level.

While Federal cost principles clearly prohibit public organizations from using program funds for dues to organizations that do substantial lobbying, the cost principles for other nonprofit organizations are silent on this restriction. Nonetheless, such expenditures could be questioned in light of the restriction in HHS' appropriation law that the funds cannot be used to pay the salaries or expenses of any grantee, contractor, or their agent to engage in any activity designed to influence legislation pending before the Congress.

Two recipients used small amounts of program funds to attend conferences during which lobbying took place and to correspond with members and/or staff of the Congress to advocate for or against pending legislation. One recipient displayed a poster at a title X clinic that urged

clients to write the Congress to defeat pending legislation banning abortion. While any use of program funds in this lobbying effort was indirect, HHS holds that title X recipients are not to advocate abortions or promote a favorable attitude toward abortion.

HHS has recognized the need to establish more specific guidance on lobbying and the payment of dues to lobbying organizations. In this regard, HHS has initiated action to amend the cost principles for grantee organizations.

RECOMMENDATIONS TO THE SECRETARY OF HHS

Pending revision of Federal cost principles, GAO recommends that the Secretary provide interim guidance to title X recipients on activities that constitute lobbying and are therefore unallowable as program expenditures.

GAO also recommends that the Secretary establish clear operational guidance by incorporating into the title X program regulations and guidelines. HHS' position on the scope of the abortion restriction in section 1008.

MATTERS FOR CONSIDERATION BY THE CONGRESS

Even if the abortion-related recommendation to the Secretary is implemented, title X recipients would still be allowed to carry out abortion activities--not with title X funds, but as a part of their overall activities by organizationally separating the family planning program from those activities.

Because of the sensitivity of the abortion issue and the

concern over how Federal family planning funds can be used, the Congress may want to provide guidance to HHS to clarify the intent of section 1008.

AGENCY COMMENTS

HHS agreed with GAO's recommendations. HHS plans to incorporate in its title X guidelines an explanation of its position on the implementation of section 1008 and to publish proposed regulations defining lobbying activities by title X and other grant recipients that are unallowable. GAO obtained comments only from HHS.

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ABBREVIATIONS

GAO	General Accounting Office
HHS	Department of Health and Human Services
OMB	Office of Management and Budget

CHAPTER 1

INTRODUCTION

In a September 8, 1981, letter, the Chairmen of the Senate Committee on Labor and Human Resources and the Senate Subcommittee on Aging, Family and Human Services requested that we review selected aspects of the title X family planning program concerning compliance with prohibitions in Federal statutes governing abortion-related activities and lobbying. (See app.I.) Our review focussed on the Department of Health and Human Services' (HHS') policies and practices for implementing and monitoring compliance with those Federal laws and the practices at selected title X recipients.

BACKGROUND

The Family Planning Services and Population Research Act of 1970 (Public Law 91-572) added title X to the Public Health Service Act. Project grants with public and private nonprofit organization, operating voluntary family planning projects and clinics, are the major component of the title X program.

The 1970 Act established within HHS' Public Health Service an Office of Population Affairs to be directed by a Deputy Assistant Secretary. The act intended that the Deputy Assistant Secretary would administer all of the HHS programs related to family planning and population research and coordinate all domestic and international family planning activities administered by the Federal Government. In practice, however, family planning programs are administered by HHS' component agencies and the Deputy Assistant Secretary coordinates efforts.

The Office for Family Planning within HHS' Bureau of Community Health Services has overall responsibility for the title X program. The Bureau sets policy, issues guidance, and allocates funds for services to HHS' regional offices, which are responsible for the day-to-day administration of the Federal title X family planning program.

HHS' regional offices directly fund some organizations which provide family planning services, but most title X funds are awarded to intermediate organizations which distribute grant funds to delegate agencies that operate clinics. The intermediate organizations are responsible for administering the grant and for overseeing the activities of their delegate agencies. For example, Genesee Region Family Planning Program, Inc., in New York is an intermediate organization which funds seven delegate agencies that operate several clinics. It is responsible to HHS for the overall grant administration and, in turn, holds its delegate agencies responsible for proper adminstration of their respective subgrants.

Since 1970 HHS has provided over $1 billion for project grants for family planning services under title X. In fiscal year 1982, $124.2 million was appropriated for title X activities of which $120.9 million was for family planning project grants. HHS awarded title X funds for family planning services to 223 direct grantees which funded 943 delegate agencies operating about 4,200 clinics. The type and number of grantees were as follows:

Types and Number of Title X Grantees

(as of April 1, 1981)

Public:	
State Health Departments	36
County Health Departments	33
City Health Departments	7
Trust Territory Health Departments	6
	82
Other nonprofit:	
Coordinating Councils	90
Planned Parenthood Affiliates	31
Hospitals	12
Universities	8
	141
Total	223

Family planning services provided by these grants typically include:

- -- Physical examinations.
- -- Laboratory tests.
- -- Education and counseling concerning reproductive health and methods of birth control.
- -- Prescribing and distributing contraceptives.
- -- Sterilization.
- -- Pregnancy tests.
- -- Pregnancy counseling.
- -- Infertility services.

- -- Special services for teenagers.

Most clients of title X-sponsored clinics are not pregnant and generally receive only physical examinations, education on contraceptive methods, and services related to birth control. In 1978, the latest year for which national data were available, about 162,000 of the 1,466,000 women (or 11 percent) making their first visit to family planning clinics received pregnancy tests.

STATUTORY RESTRICTIONS ON ABORTION-RELATED ACTIVITIES AND LOBBYING

Activities related to abortions and lobbying are restricted by Federal laws. Section 1008 of title X states that "None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning." Restrictions on lobbying primarily stem from provisions in several annual appropriations acts that provide that no appropriated funds shall be used by grantees to influence legislation pending before the Congress.

OBJECTIVES, SCOPE, AND METHODOLOGY

Abortion-related activities

We reviewed HHS' program regulations and guidelines and other policy guidance implementing section 1008. We reviewed the grant awards and administration procedures followed in 6 of HHS' 10 regions. At each region, we interviewed program officials and examined grant documents to see how section 1008 was interpreted and implemented. These 6 regions administer grants totalling $98 million (or about 80 percent) of the title X funds.

To test for compliance with the HHS policies, we reviewed the activities of 14 family planning clinics in California, Kentucky, Massachusetts, Maryland, Ohio, Texas, Vermont, and the District of Columbia. (See app. II.)

At the 14 clinics, we reviewed local policies and practices; interviewed staff responsible for counseling, education and referral activities; ascertained the guidance furnished by HHS to title X recipients; and reviewed a limited number of client records selected randomly. In total we examined 474 records of pregnant clients to verify clinic counseling and referral practices. We do not consider this test to be representative of all title X clinics and the results should not be projected. We did not contact clients to obtain their views on the counseling provided because of concern about breaching client confidentiality.

We judgmentally selected the 14 clinics to provide for (1) geographic distribution of locations nationwide, (2) different types and sizes of title X recipients, and (3) rural and urban clinic settings. In selecting these locations, we avoided the title X recipients who were included in recently completed or ongoing audits by HHS' Inspector General.

In addition, to ascertain how title X recipients that also provide abortions as part of their overall operations comply with HHS guidance, we conducted limited audit work at certain other title X clinics that provide family planning services and abortions. These clinics were located in California, Ohio, and New York.

The demographic data requested on clients who are pregnant when they first seek services in title X clinics

are not collected by HHS' data systems, and comparative analysis of clients referred for abortions and educational materials used in public and private clinics could not be made. We did not undertake statistical tests to obtain the data because of the length of time that would have been required.

On February 22, 1982, HHS issued proposed regulations which would, among other things, require notification of the parents of unemancipated minors provided prescription methods of birth control. These proposed regulations are intended to implement section 931(b)(1) of the Omnibus Budget Reconciliation Act of 1981. At the time of our review these regulations had not been finalized.

Lobbying activities

Our review of title X recipients' lobbying activities focused on (1) identifying Federal laws, regulations, instructions, and other guidance applicable to lobbying by recipients and (2) determining whether recipients used Federal funds for lobbying. To ascertain whether grant recipients had sold or donated mailing lists to political candidates or organizations we held discussions with and reviewed the records of seven recipients. We found no indication that this practice occurred. In addition, we identified no Federal laws or regulations which prohibit this practice by grant recipients where it is not precluded in applicable grant documents.

We interviewed officials in HHS' Office of the Assistant Secretary for Management and Budget; Public Health Service's Office of Population Affairs, Bureau of Community Health Services, and Office for Family Planning; regional offices; and selected title X recipients

to identify Federal lobbying restrictions and guidance provided to recipients. In addition, we interviewed (1) officials of the Office of Management and Budget (OMB) to identify existing and/or proposed lobbying restrictions in OMB circulars and (2) representatives of the Internal Revenue Service to discuss lobbying restrictions imposed on nonprofit, tax-exempt organizations.

Our review included work at seven nonprofit title X recipients in California, New Jersey, New York, and the District of Columbia. (See app. II.) We visited five grantees--three coordinating councils and two Planned Parenthood organizations--and two other Planned Parenthood organizations operating as delegates of two of the coordinating councils. All received title X grants or subgrants for $125,000 or more. The five grantees included in our audit received about $8.4 million of title X funds during their most recent budget period. These grantees and delegate agencies were selected judgmentally considering, among other things, their size, and avoiding duplicating locations included in recent audits by HHS' Inspector General. Planned Parenthood organizations were included because the requestors asked questions specifically about such organizations. Coordinating councils--nonprofit recipients covered by the same OMB circulars as Planned Parenthood organizations--were included so that a range of family planning organizations was represented. The largest delegate agency of two coordinating councils was also reviewed. The organizations reviewed are not statistically representative of title X grant recipients.

At the recipient level we interviewed the executive director, financial director, board members, and other representatives to ascertain whether they lobbied and

whether title X program funds were used. We reviewed grant applications and budgets, financial expenditure reports, and audit reports and traced selected expenditures to source documents to ascertain whether they were related to lobbying activities. We also reviewed correspondence files, board minutes, and annual reports to the Internal Revenue Service to identify potential lobbying activities.

Our audit approach varied somewhat for each grant recipient because they had different accounting systems, received grants covering different periods, and were organized differently. In all cases, however, we reviewed selected expenditures made during January to June 1981, the period when the Congress was considering incorporating the title X program into a block grant, and during which time several bills were being considered in the Congress to limit the availability of abortions. We believe lobbying, if it occurred, would most likely have occurred during this period.

Our review did not include work at Planned Parenthood Federation of America because (1) according to HHS officials, the Federation did not receive title X funds during the period covered by our review and (2) as agreed with the requestors' offices, the results of our work on lobbying activities at the seven grant recipients did not indicate that further work was warranted.

Comments were obtained only from HHS and not from individual grant recipients included in our review.

As agreed with the requestors' offices, no work was done to determine how the effectiveness of the program can be evaluated because the title X program was being considered for inclusion as part of a block grant.

Our review was conducted in accordance with the Comptroller General's "Standards for Audit of Governmental Organizations, Programs, Activities, and Functions."

CHAPTER 2

CONGRESSIONAL CLARIFICATION OF ABORTION RESTRICTIONS IS NEEDED

HHS' policy allows title X recipients to use organizational techniques to insulate the title X family planning program activities from abortion activities prohibited by section 1008, thereby not jeopardizing their eligibility for title X funds. That policy, established in 1971, stems from HHS' position that the restrictions of section 1008, prohibiting the use of title X funds "* * * in programs where abortion is a method of family planning" are only applicable to that part of the recipient's activities supported with title X funds. HHS' interpretation has created the impression, in some instances, that federally funded title X family planning clinics are engaging in prohibited activities.

In view of the sensitivity of the abortion issue and concern over how Federal family planning funds may be used, the Congress may want to clarify the intent of section 1008.

ORGANIZATIONAL ARRANGEMENTS USED BY SOME FAMILY PLANNING CLINICS

HHS estimates that about 74 organizations (46 hospitals, 21 Planned Parenthood affiliates, 4 other

nonprofit organizations, and 3 public health departments) receiving title X funds also perform abortions at clinics colocated with family planning programs.[1] While such organizations are expected to maintain physically separate family planning and abortion programs and separate records to account for each program, they are allowed to share facilities and staffs and to prorate common expenses. The examples below describe the organizational arrangements used by two title X recipients which enable them to provide both abortion and family planning services while still complying with HHS' policy.

Example #1

HHS has funded a nonprofit family planning organization located in Columbus, Ohio, since 1971. In 1978, the organization established a separate but controlled corporation for the sole purpose of providing first trimester abortions. The title X recipient has effective control of the corporation through interlocking trustees and the exclusive right and power to nominate and elect trustees.

The abortion and family planning clinics operate simultaneously on Wednesdays and Fridays in the same three-story building, with nothing on the exterior of the building indicating the existence of two separate operations. The abortion clinic leases space on the second floor from the title X recipient, and the family planning clinic occupies the third floor. Under an informal agreement, the abortion clinic pays the title X recipient a management fee for services of the executive

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[1] Information was not available on the number of family planning clinics that provided abortions at separate locations.

director and financial manager. Two other employees of the family planning clinic also work for the abortion clinic. The family planning clinic refers clients to the abortion clinic, but separate medical charts and patient accounts are established and maintained.

According to the executive director, the title X recipient established the separate corporation in order to avoid the appearance of violating restrictions imposed by section 1008. The abortion clinic performs about 1,000 abortions per year.

Example #2

HHS has funded a nonprofit organization in New York City which operates both abortion and family planning clinics. This title X recipient operates the abortion clinics under the same corporate organization, but separates the programs by scheduling clients at different times. At its Brooklyn clinic, for example, the scheduling was as follows:

	Abortion clinic hours	Family planning and abortion postoperative hours
Tuesday	8:30 to 10:00 a.m.	10:30 a.m. to 5:00 p.m.
Wednesday	8:30 to 10:00 a.m.	10:30 a.m. to 5:00 p.m.
Thursday	8:30 to 10:00 a.m.	10:30 a.m. to 5:00 p.m.
Friday	None	11:00 a.m. to 7:00 p.m.
Saturday	8:30 to 10:00 a.m.	10:30 a.m. to 5:00 p.m.

Both the family planning and abortion clinics are staffed by the same personnel, and the medical director for the family planning program generally performs the abortions for the clinic as well. The clinic director said that the abortion and family planning clinics' schedules did not overlap and that clients were not commingled.

The expenses of the clinic operations are maintained in separate accounts. All direct costs are charged specifically to family planning, abortions, or laboratory services as appropriate and indirect costs are prorated. Unlike the operation in the Ohio example, separate medical charts and patients accounts are not maintained, and all abortion clients are counted as family planning clients in the HHS reporting system. In 1980 the Brooklyn clinic served 4,462 contraceptive clients and performed 2,341 abortions.[1]

BASIS FOR HHS' POLICY

HHS' policy which permits funding organizations which operate abortion clinics outside the title X program is based on its assessment of the legislative intent. According to HHS' General Counsel, the most significant expression of that intent is contained in the Conference Report accompanying the Senate bill which eventually became Public Law 91-572. The Conference Report contained the following statement:

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[1] Because questions were raised during a previous GAO review as to whether certain practices at this clinic were in conformity with HHS' interpretation of section 1008, GAO sent a letter of inquiry to HHS. Using information obtained during an audit by the Inspector General, HHS' Office of General Counsel reviewed the concerns raised in our letter and concluded no violations of section 1008 were indicated at the clinic.

"It is, and has been, the intent of both Houses that the funds authorized under this legislation are used to support preventive family planning services, population research, infertility services and other related medical, informational, and educational activities. The conferees have adopted the language contained in Section 1008, which prohibits the use of such funds for abortion, in order to make clear this intent. The legislation does not and is not intended to interfere with or limit programs conducted in accordance with State or local laws and regulations which are supported by funds other than those authorized under this legislation."[1] (Underscoring added.)

In addition, HHS considers the statement on the floor of the House by the sponsor of section 1008 to be another major source of congressional intent:

"Mr. Speaker, I support the legislation before this body. I set forth in my extended remarks the reasons why I offered the amendment which prohibited abortion as a method of family planning * * *"

* * * * *

"With the 'prohibition of abortion' the committee members clearly intended that abortion is not to be encouraged or promoted in any way through this legislation."

[1] Conference Report, H. Rep. No. 91-1667, December 3, 1970, pages 8 and 9.

* * * * *

"Programs which include abortion as a method of family planning are not eligible for funds allocated through this Act."[1] (Underscoring added.)

Based on these expressions of the congressional intent, HHS has adopted the view that section 1008 prohibits (1) the provision of abortion as a method of family planning and (2) activities that promote or encourage the use of abortion as a method of family planning--but only when included in "programs" funded by title X.

Implementation of HHS' policy position at the local level can leave the impression that title X funds have been improperly used when recipients also operate abortion clinics. For example, HHS region V received a letter alleging that the abortion clinic operated by the Ohio organization discussed in example #1, "* * * invites the abuse of public funds in terms of channeling federal monies into the operation of an abortion clinic * * *." The individual was advised by HHS regional officials:

"* * * that to persons not intimately familiar with a given situation, the operation of an abortion facility at the same site as a federally sponsored family planning clinic brings to mind the possibility of inappropriate sharing of resources and undue influences on family planning services * * *."

[1] 116 Cong. Rec. 37375 (1970).

Thus, the HHS policy permits title X recipients to organize so as to conduct abortion activities under a separate "program" without jeopardizing their eligibility for title X funds.

MATTERS FOR CONSIDERATION BY THE CONGRESS

HHS' interpretation of section 1008 allows title X recipients to use non-title X program funds to carry out abortion-related activities which would not be allowed as part of the title X program, so long as the abortion activities are organizationally separated from the title X family planning services.

Because of the sensitivity of the abortion issue and the concern over how Federal family planning funds may be used, the Congress may want to provide guidance to HHS to clarify the intent of section 1008 if it does not want title X funds to go to organizations providing abortions.

CHAPTER 3

FAMILY PLANNING CLINICS NEED FORMAL GUIDANCE ON ABORTION-RELATED MATTERS

We found no evidence that women had been advised by title X grantees to have abortions or that title X funds were used to pay for abortions. However, some title X recipients' practices raised questions as to whether they comply with certain title X restrictions on abortion-related activities.

The questions stem from the fact that HHS has not issued formal policy guidance interpreting section 1008. Instead, HHS has relied on a series of legal opinions that often "draw a fine line" between allowable and unallowable activities and these opinions have not always been communicated to all title X recipients.

HHS' INTERPRETATION OF SECTION 1008

Since early 1971, HHS has taken the position that section 1008 prohibits activities that encourage, promote, or advocate abortion, as well as the use of abortion as a method of family planning, if they are carried out as part of the program supported with title X funds. These policy positions, based on the internal HHS General Counsel opinions, have not been formalized and incorporated into program regulations and/or guidelines.

Based on HHS' legal opinions, the following types of activities related to abortions are allowable under title X programs. Recipients may

- provide information about abortion services;
- provide the name, address, and telephone number of abortion providers;
- collect statistical data and information regarding abortion;
- inspect facilities to determine their suitability to provide abortion services; and
- pay dues to organizations that advocate the availability of abortion services.

Recipients may not

- provide counseling that encourages a person to

obtain an abortion,
- -- provide transportation to an abortion center or provider,
- -- provide proabortion speakers to debate the issues in public forums,
- -- advocate the need and suitability of abortion service in the community,
- -- produce or show movies that tend to encourage or promote a favorable attitude toward abortion,
- -- provide abortion as a suitable backup method of family planning,
- -- make specific appointments or referrals for an abortion unless medical conditions warrant,
- -- bring legal action to liberalize abortion-related statutes, and
- -- pressure local governing bodies to change restrictive abortion policies.

HHS' General Counsel has also concluded that, when title X recipients conduct abortion activities which would not be permissible if they were part of the grant-supported program, the recipient must ensure that the title X-supported program is separate and distinguishable from the abortion activities.

This position is contained in the following excerpt from an HHS legal opinion.[1]

> "It is recognized that in some situations, the abortion element in a program of family planning services may bulk so large and be so

[1] Memorandum GC (Mangel) to DASPA (Hellman), "Abortions as a Method of Family Planning--Section 1008 of the Public Health Service Act," April 20, 1971, DF#38B.

> intimately related to all aspects of the program as to make it difficult, if not impossible to separate the eligible and non-eligible items of cost. In such a case, we think a grant for the project would be legally questionable.
>
> "In other words, a mere technical allocation of funds, attributing Federal dollars to non-abortion activities and other dollars to abortion activities, in what is otherwise a discrete project for providing abortion services, would not, in our opinion, be a legally supportable avoidance of the section 1008 prohibition.
>
> "In our opinion, the activities (abortion and non-abortion) must be so separated as to constitute separate programs (projects). As we have already indicated, our conclusion does not require separate grantees or even a separate health facility. However, neither do we think that separate booking [sic] entries alone will satisfy the spirit of the law."

Over the years a fine line between allowable and unallowable activities has evolved as illustrated by the following examples:

- -- Recipients may use title X funds to pay the cost of inspecting abortion facilities to see that they meet national Planned Parenthood Federation of America standards, but may not make an appointment for or direct clients to those facilities.

- -- Title X funds may be used to pay dues to organizations that advocate the provision of

abortion as a backup for contraceptive failure, but may not be used to advocate the need for and suitability of abortion in the community.

- Title X funds may not be used to pay transportation costs for women to go to abortion clinics, but recipients may provide or arrange such services under that part of their operation not supported with title X funds. Similarly, the recipients may, under their separate programs, make loans to women to pay for abortions.

HHS' PROGRAM REGULATIONS AND GUIDELINES DO NOT REFLECT ITS POLICY ON ABORTION RESTRICTIONS

The position that section 1008 not only prohibits abortion as a method of family planning, but also prohibits activities which promote or encourage a favorable attitude toward abortion as part of the title X program has not been incorporated into HHS' regulations or guidelines. In contrast, HHS relies on its program regulations[1] and guidelines to provide guidance on other major policies to title X recipients.. In effect, HHS' regulations that spell out overall policy and implement provisions of the law and corresponding program guidelines that elaborate on the law and regulations in operational terms do not contain the specific policy guidance concerning section 1008 needed by title X recipients.

We could not determine from discussions with HHS'

[1] 42 C.F.R. Part 59.

officials the rea[sons] why HHS elected to exclude from its regulations and guidelines its position on the scope of prohibitions in section 1008. HHS' regulations (dated June 1980) and its prior regulations simply state that title X projects shall not "* * * provide abortion as a method of family planning." The policy that section 1008 also prohibits activities which promote, encourage, or advocate abortion are not mentioned in HHS' regulations. Also, the HHS program guidelines for family planning guidelines for family planning services refer to the title X program regulations with no elaboration on the meaning of section 1008.

HHS, however, has periodically issued memorandums to its regional program administrators containing Office of General Counse[l] interpretations of section 1008. Five of six regions we visited had transmitted this information to grantees, but only 3 of the 10 grantees passed it on to their delegate agencies and clinics. Of 14 clinics visited, only 6 had received HHS' legal interpretations of section 1008.

While this process made HHS' policy available to some title X clinics, the policy was nevertheless not included in the regulations and guidelines that grantees are required to follow as a condition of their grants. For example, the title X grantee in Los Angeles, according to its executive director, has received no written guidance from HHS on interpreting section 1008. This grantee, one of the largest nationally, had 26 delegate agencies that operated 94 clinics.

SOME COUNSELING AND REFERRAL PRACTICES MAY NOT BE APPROPRIATE

Under the HHS program guidelines, pregnant

women should be offered information and counseling regarding their pregnancy. The guidelines state that individuals requesting information on options for managing an unintended pregnancy are to be given nondirective counseling[1] on the options available and referred upon request, including being referred to abortion providers. At the clinics reviewed, the number of pregnant clients coming to clinics for their first visit represented between 5 and 69 percent of the clientele.

At 10 of the 14 clinics visited, counseling was available through the title X-supported programs. At the four other clinics, one did not provide any counseling and the other three provided counseling, but not as part of their title X programs. Officials at all clinics which provided counseling indicated that they provided only nondirective counseling in accordance with HHS guidelines. Referral practices varied from clinic to clinic, and some clinics did not comply with HHS' policy position. We did not find any evidence, however, that pregnant women were advised to have abortions.[2]

Counseling practices

Typically, counseling of pregnant women occurred after clients received tests that confirmed their pregnancy. When the pregnancy was desired, clients were generally advised to seek prenatal care and given referrals if needed. If a woman indicated the pregnancy

[1] Nondirective counseling is the provision of information on all available options without promoting, advocating, or encouraging one option over another.

[2] None of the clinics reviewed provided or referred any client for menstrual extraction procedures.

was unintended or not wanted, counseling was generally provided. Officials at the 13 clinics offering counseling said that nondirective counseling was available on the following options:

-- Prenatal care and delivery.

-- Infant care, foster care, or adoption.

-- Pregnancy termination.

The pregnancy counseling provided by clinics varied as shown below:

-- Seven clinics counseled clients, but only on the option they decided to pursue.

-- Four clinics counseled clients on all options when the client expressed that the pregnancy was unintended or she was unsure of what to do.

-- Two clinics counseled all pregnant women on all options available to them.

One of the 13 clinics offered followup counseling to clients referred for abortions, although officials at all clinics said postabortion counseling was available if requested by the clients.

According to HHS' headquarters officials, all options do not have to be discussed, but they believe it is "professionally incumbent" upon the counselors to discuss other options with women who say they are only interested in abortions. When a woman is interested in continuing her pregnancy, HHS' officials said that

abortion should not be discussed.

Eleven of the clinics required their counseling staffs to take training and/or participate in an appropriate orientation course covering problem pregnancy counseling and referral policies. The academic background of the staff providing counseling varied. Registered nurses and nurse practitioners often provided the counseling to pregnant clients. At some clinics, counselors had advance degrees in the fields of psychology or social work, and at other clinics the counselors had no formal credentials or degrees in areas related to counseling. Typically, the counselors had not received formal training in counseling pregnant women, but at most clinics counselors had some formal or in-service training in related areas, such as crisis counseling.

We were advised by clinic officials that the topic of abortion and counseling often came up spontaneously during in-service training and other courses. Clinic officials said they always emphasize a nondirective and unbiased approach to counseling pregnant women. Interviews with several counselors showed that they were aware of restrictions against encouraging or advising clients to have abortions.

Questionable counseling practices

Seven clinics did not provide counseling on all options available to pregnant women. At one clinic, women were required to complete paperwork before their pregnancy tests and preselect how they intended to deal with their pregnancy. If they chose to continue the pregnancy, they were counseled on that option. If they checked abortion, they were counseled only on that choice. Six other clinics, which did not require

prepregnancy test decisions, did not routinely counsel women on other alternatives if they had decided on abortion. Based on the HHS guidelines which recommend that all options be discussed with clients deciding on abortion and HHS' officials views that it is "professionally incumbent" to discuss all options, these practices are questionable.

Referral process

When clients are counseled and choose to terminate their pregnancies, referrals may be made to abortion providers. The extent to which clinic personnel can assist clients in making abortion arrangements is limited, according to HHS' interpretation of section 1008. HHS' referral policy, however, is not clearly stated in the program regulations or guidelines and certain abortion referral practices by title X recipients raise questions as to whether they go beyond the "mere referral" HHS maintains is permitted under the law.

Title X regulations require that each project provide clients with medical services related to family planning and make referrals to other medical facilities when medically indicated. Therefore, if continuing a pregnancy would endanger the mother's life, a referral to a provider who might recommend or provide an abortion would be medically indicated. However, the regulations are silent on the referral process for abortions in other instances.

Since 1971, HHS has relied on legal opinions that applied the concept of "mere referral" to the restriction imposed by section 1008. Under this concept, title X program funds may not be used to make an appointment for a woman, to provide transportation, or to take other

affirmative action to secure an abortion.

The title X program guidelines, issued in 1981, provided that women needing services, which are beyond the ability of the clinic to provide, should be referred to other providers for care. This provision, however, as it relates to abortion referrals, does not reflect the "mere referral" concept traditionally held by HHS. Although HHS' officials advised us that the "mere referral" concept has been agency policy on abortion referral, they did not explain why this policy had not been included in program regulations or guidelines.

We reviewed several clients' charts to determine, among other things, the referral outcomes at the clinics visited. The results of our review cannot be projected, but provide a limited perspective on referral outcomes at these particular clinics. The results are shown on the next page.

Some clinic practices may go beyond "mere referral"

Referral practices varied, but most clinics provided some type of information on the sources of abortion services to clients desiring to terminate pregnancies. By applying HHS' policy, we identified the following practices that could be construed to go beyond the "mere referral" policy:

-- Four clinics provided clients brochures prepared by abortion clinics. Some of the HHS regional staff were not sure this practice was acceptable, while others felt it was reasonable and within the spirit of HHS' policy.

-- At two clinics, clients seeking abortions were allowed to use the telephone to make appointments for abortions. HHS' officials were not sure this practice was within the spirit of the HHS policy because it went beyond the concept of providing information with no further affirmative action.

[Table omitted]

-- At one clinic, appointments for abortions were made for clients who did not speak English. (The HHS Inspector General identified two other instances of counselors making abortion appointments for clients.)

-- At one clinic, the title X recipient provided women loans for abortions from nonprogram funds; however, administrative costs associated with the referral and loans were charged to title X program costs. (A similar observation was noted by HHS' Inspector General.)

The Office of the Inspector General also identified that several title X clinics in Indiana provided and witnessed the signing of consent forms required by an abortion clinic. This practice is prohibited by section 1008, according to HHS, since it could be considered promoting abortion. The title X grantee indicated that the consent form was completed only after women had decided to have an abortion and that the practice simply facilitated the abortion decision and did not encourage or promote abortion. HHS regional officials ordered the practice stopped as part of the title X program, and the recipient told us it had passed the instructions to its delegates.

SOME EDUCATIONAL MATERIALS USED IN TITLE X CLINICS MAY BE IMPROPER

Five clinics routinely offered educational materials to family planning clients that presented abortion as a backup if a contraceptive method failed. Other clinics, however, did not use educational material referring to abortion since they felt it could be construed as encouraging or promoting a favorable attitude toward abortion. Examples of educational material included:

-- One clinic used a film about birth control methods and sterilization that included a section that presented abortion as a legal alternative in the event of an unwanted [pregnancy]. This film was shown to all clients entering the large Texas clinic for family planning services. At our request, HHS' regional officials watched the film and concluded the film did not encourage abortion as a method of family planning, but could be construed to be encouraging a favorable attitude about abortions.

-- Four of the 14 clinics provided or made available to all clients entering the family planning program handout material that discussed abortion. Typically, handout materials listed various birth control methods with the barrier method and early abortion in the event of a failure as an alternative method. According to an HHS General Counsel opinion, section 1008 prohibits the use of abortion as a backup method of family planning and therefore cannot be offered.

MONITORING FOR COMPLIANCE WITH SECTION 1008 IS LIMITED

HHS' officials responsible for monitoring the title X program have generally not taken inspection trips solely to check for compliance with section 1008, but they claimed to have looked at compliance with all program guidelines and requirements in instances where onsite inspections have been conducted. In the absence of HHS' regulations and guidelines that elaborate national policy established by section 1008, efforts to closely monitor compliance are difficult.

Officials at four HHS regions said that travel budget cuts and lack of personnel have prevented regular monitoring trips to all grantees. One official advised us that the high visibility of the abortion issue tends to surface possible gross violations and reduce the need for regular surveillance of grantee activities.

HHS' policy requires that all allegations of violations of section 1008 be investigated by a team composed of personnel familiar with all aspects of the title X program and overall HHS' grant administration. We were advised that only one investigation had been made. In this case, the title X recipient was alleged to be

-- encouraging or promoting abortion by administering a petition calling for liberalized abortion laws,

-- providing literature that promoted a favorable attitude about abortion in a common waiting room for family planning and abortion clients, and

-- facilitating abortions by negotiating reduced fees and making arrangements for abortions.

HHS' investigation found that the title X recipient carried out the alleged activities, but could not determine if they were a part of the title X-funded program. The grantee was advised to remove the petitions and abortion materials from the waiting room and to set up a bookkeeping system to keep costs separated. The investigation concluded the practices were minor and technical in nature and did not warrant further action.

Until 1981, HHS' Office of the Inspector General had not made a programwide review of compliance with section 1008. In 1981 the Inspector General reviewed 32 title X grantees, focusing on lobbying and abortion activities. The Inspector General review has been completed and reports on individual recipients have been issued. In addition to the practices discussed on page 18, at one grantee the Inspector General questioned about $400 for malpractice insurance for an abortion clinic charged to the program funded, in part, by title X.

CONCLUSIONS

Since 1971, HHS has held that the abortion prohibition went beyond the literal reading of section 1008 and also prohibited activities which promoted or encouraged abortions. However, HHS has neither clarified its policy nor used its regulations and guidelines to communicate to title X recipients its position on section 1008. As a result, a degree of uncertainty exists and some grantees' practices may go beyond what, in HHS' opinion, is permissible under section 1008.

RECOMMENDATION TO THE SECRETARY OF HHS

We recommend that the Secretary establish clear operational guidance by incorporating into the title X program regulations and guidelines HHS' position on the scope of the restriction in section 1008.

In doing so, we recommend that the Secretary consider the grantee practices discussed in this report and in the Inspector General's reports with a view toward providing as explicit guidance as possible on the activities that are and are not allowed.

AGENCY COMMENTS

HHS concurred with our recommendation. The Secretary plans to direct the Assistant Secretary for Health to include in title X program guidelines an explanation of the Department's position on the implementation of section 1008. (See app. III.)

CHAPTER 4

TITLE X RECIPIENTS NEED MORE SPECIFIC GUIDANCE ON LOBBYING

Most of the title X recipients reviewed for lobbying were involved in some types of lobbying activities. Generally, these activities were not paid for with appropriated funds or charged to the title X program and were therefore not subject to Federal lobbying restrictions. However, some title X recipients used program funds to pay dues to organizations that lobby--a

questionable expenditure in light of current legislative restrictions and HHS' policies. In addition, some recipients spent small amounts of title X program funds for lobbying.

The current OMB and HHS guidance regarding the use of program funds for the payment of dues is inconsistent, and guidance on lobbying does not specifically identify the types of activities that constitute lobbying and are therefore unallowable as title X program expenditures.

FEDERAL RESTRICTIONS ON LOBBYING

Federal law prohibits grant recipients from using Federal funds to lobby the Congress--that is, to engage in activities designed to influence legislation or appropriations pending before the Congress. Under HHS' policy, lobbying costs are not normally allowable program expenses. However, HHS has not issued specific guidance which identifies activities that constitute lobbying.

Legislative restrictions

The use of appropriated funds, including title X funds, to lobby the Congress is prohibited by Federal appropriations legislation. Since the early 1950s, an annual appropriation act restriction has prohibited the use of Federal funds by all executive agencies, departments, and government corporations for "grass roots" lobbying the Congress--appeals addressed to the public to contact the Congress to influence pending

legislation.[1] Also, since fiscal year 1974, HHS, in its own annual appropriations legislation, has been prohibited from using appropriated funds for publicity and propaganda to support or defeat legislation pending before the Congress, except when officials are presenting views to the Congress that affect HHS' activities and policies. The scope of these restrictions was expanded by HHS' fiscal year 1979[2] appropriations act which prohibits HHS' grant and contract recipients from using HHS' appropriations for lobbying the Congress as follows:

> "No part of any appropriation contained in this Act shall be used to pay the salary or expenses of any grant or contract recipient or agent acting for such recipient to engage in any activity designed to influence legislation or appropriations pending before the Congress." (Underscoring added.)

These restrictions in Federal appropriations legislation apply only to lobbying the Congress.

Administrative restrictions

HHS' and OMB's guidance implementing Federal lobbying restrictions are inconsistent and lack specificity.

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[1] Initially this antilobbying appropriation restriction was contained in the Independent Offices Appropriation Act; however, in recent years, it has been included in the annual Treasury, Postal Services, and General Government Appropriation Act.

[2] This restriction was not applicable for title X recipients until 1980 because title X appropriations were not included in HHS' fiscal year 1979 appropriations, but rather in a separate Continuing Resolution.

HHS' guidance generally prohibits the payment of any lobbying costs with program funds, which includes not only title X grant funds, but also non-Federal funds used by recipients to meet their grant matching shares and income generated as a result of the grant. This guidance applies to the use of program funds not only for lobbying at the Federal level, but also at the State and local levels. The prohibition was set forth in an HHS Grants Administration Manual Circular issued May 25, 1979, which stated that the costs of lobbying expenditures are normally unallowable because they do not benefit the work performed under the grant.[1]

HHS' regulations require title X grant recipients to follow applicable OMB guidance in the administration of their grants. According to the OMB circular setting forth cost principles that must be followed by State and local government grant recipients,[2] program funds can be used to pay dues to civic, business, technical, and professional organizations, but only if such organizations do not devote a substantial part of their activities to lobbying. However, this restriction is not included in OMB's circulars setting forth cost principles for universities and nonprofit organizations[3] nor HHS' cost principles for hospital grant recipients[4] -- both of which simply provide that dues are an allowable program

[1] In some situations, expenses associated with lobbying at the State and local levels would be allowable program charges, such as when grantees' programs include an advocacy function.

[2] OMB Circular A-87.

[3] OMB Circulars A-21 and A-122.

[4] HHS issues cost principles for hospitals, not OMB. See 45 CFR Part 74.

expense, without distinguishing between organizations that lobby and those that do not. As a result, nonprofit recipients do not have the same lobbying restrictions on dues as public recipients.

Most importantly, neither HHS' nor OMB's principles specifically identify activities that constitute lobbying and that are therefore unallowable as program charges.

LOBBYING BY TITLE X RECIPIENTS

All seven title X recipients reviewed for lobbying had incurred expenses that, in our opinion, raised questions as to adherence with Federal restrictions. Two recipients lobbied, but we could not determine from their records whether program funds were used. Most lobbying expenditures of the other five recipients did not involve program funds and were therefore not subject to Federal restrictions. However, of these five

-- all used program funds to pay dues to organizations that lobby and

-- two used small amounts of program funds to lobby at the Federal and/or State level.

Dues paid to organizations that lobby

Six recipients, including five who clearly used program funds, paid dues to organizations that lobby at the Federal level. The recipients' program expenditures for such dues ranged from $25 to over $27,000 during the period covered by our review, and the combined expenditures of the five recipients was about $42,000. Although the payment of dues by nonprofit organizations

is an allowable program expense, the use of program funds to pay dues to organizations that lobby substantially for or against pending legislation that affects the grant program is questionable in light of current legislative prohibitions against using appropriated funds for lobbying and HHS' policy that generally prohibits program expenses for lobbying.

We discussed the payment of dues to organizations that lobby with three recipients. Officials of two recipients said dues to professional organizations should be allowable because such organizations provide many needed services. One executive director told us that he did not think the payment of dues to lobbying organizations is currently prohibited by HHS and that it should not be. However, to ensure the allowability of expenditures for dues to an organization that lobbied at the State level, he noted, in his letter transmitting payment, that his dues should be used for educational purposes. The executive director of the third recipient, rather than having a firm position, sought guidance as to whether he should stop paying dues with program funds.

Program funds used for lobbying activities

Two recipients spent program funds for lobbying at either the Federal or the State level. Lobbying at the Federal level is prohibited by Federal law and administrative policy. Lobbying at the State level generally is prohibited by administrative policy only. As shown below, the title X program expenditures associated with lobbying activities were small and, in some cases, indirect.

At the Federal level:

-- Two recipients spent program funds for transportation, lodging, and other expenses associated with attending conferences in Washington, D.C., during which officials visited Members of Congress and/or their staff and lobbied against pending legislation to incorporate title X into a block grant. About $200 was spent for this activity.

-- One recipient incurred undetermined costs associated with writing the Congress to lobby against pending legislation. The costs involved salaries and expenses related to preparing and distributing the correspondence.

-- One recipient displayed a poster and distributed post cards at a title X clinic encouraging clients to write their congressional representatives to urge them to vote "pro choice" on pending legislation. Costs associated with this activity were too obscure to calculate. However, HHS holds that title X recipients are not to advocate abortions or even foster a favorable attitude toward abortions.

At the State level:

-- One recipient incurred costs for attending a conference that involved lobbying at the State level. About $113 was spent on this activity.

-- One recipient provided space for about 6 weeks in a title X clinic to an organization involved in lobbying at the State level and, as a result,

program funds were indirectly involved.

Recipients did not agree with our observations that the costs of these activities were unallowable program expenditures because they were associated with lobbying. For example, one executive director said he thought that meeting and corresponding with Members of Congress was more an educational activity than a lobbying activity. He told us that he had not received clear guidance explaining activities which constitute lobbying. Another executive director disagreed that displaying the poster was an improper activity because (1) Federal funds were not used to print it and (2) it was more an advertisement than a lobbying effort.

HHS' EFFORTS TO CLARIFY LOBBYING GUIDANCE

HHS has recognized the need to clarify guidance provided recipients on lobbying and has begun taking corrective measures. In response to inquiries about the possible misuse of Federal funds for lobbying, the Secretary of HHS asked the Assistant Secretary for Management and Budget to identify ways to reduce possible abuse. In June 1981, the Assistant Secretary suggested several steps that could be taken, including (1) making grant recipients aware of applicable restrictions, (2) increasing monitoring, and (3) identifying clearly activities considered unallowable.

In October 1981, HHS recommended that OMB review its cost principles to clearly set forth unallowable lobbying activities and to prohibit all recipients, including nonprofit organizations, from using program funds for dues to organizations that devote a substantial part of their activity to lobbying. HHS believes that lobbying

restrictions should be set forth on a Government-wide basis and, therefore, guidance for nonprofit grantees should be issued through OMB. However, we were told that, if OMB does not revise its cost principles, HHS will issue restrictions on lobbying as part of its policy guidance. In late June 1982, OMB officials told us no final determination had been made on how its cost principles will be changed to reflect lobbying restrictions.

CONCLUSIONS

Clear Federal guidance is needed both to insure that title X program funds are not used for lobbying and to preclude unnecessary controversy over whether grantees are violating Federal restrictions. The move to revise and make more specific the cost principles applicable to all Federal grantees is the appropriate mechanism to achieve these ends. Until this is done, however, HHS should provide title X grantees interim guidance concerning the activities that constitute lobbying and are therefore unallowable as program expenditures.

RECOMMENDATION TO THE SECRETARY OF HHS

Pending revision of Federal cost principles, we recommend that the Secretary provide interim guidance to title X recipients on activities that constitute lobbying and are unallowable as title X program expenditures.

AGENCY COMMENTS

HHS concurred with our recommendation. In the near future, HHS plans to issue proposed regulations defining lobbying activities that are unallowable in its programs, including title X programs. (See app. III.)

[APPENDIX I to GAO Report]

September 8, 1981

Mr. Gregory J. Ahart
Director
Human Resources Division
United States General
Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Ahart:

As you know, the Title X Family Planning program has not been consolidated into a block grant as proposed by the President but has been reauthorized as a categorical program for another three years. The Committee on Labor and Human Resources and its Subcommittee on Aging, Family and Human Services are very much interested in the operation of this program and plans for extensive oversight of the program.

During the last several months, Committee staff have been discussing three areas of interest regarding the Title X program with your representatives. These areas are (1) use of Title X funds for political lobbying, (2) use of Title X funds for abortion or abortion referrals, and (3) the overall effectiveness of the program. We understand that you have done some preliminary audit work in the first two of these areas. Now that the budget reconciliation process has been completed, we have identified several specific concerns in each of these three areas.

Following are several questions of interest to us in these areas. To the extent data are available, we would

like to have information on all Title X grantees. In cases where national data are not available, we would like you to select a sample of grantees or clinics, including, as appropriate, coordinating councils, health departments, and planned parenthood affiliates. We understand you have already reported on political activities of some community action agencies, a number of which are Title X grantees.

USE OF TITLE X FUNDS FOR POLITICAL ACTIVITIES

1. What Federal laws and regulations or instructions or guidance issued by Federal agencies pertain to lobbying activities by Title X grantees and clinics?

2. Is there any evidence that Planned Parenthood Federation of America, or its affiliates has either donated or sold at minimal costs mailing lists to political candidates or organizations? Is there evidence that this represents a violation of Federal laws or regulations?

3. What types of political lobbying activities are Title X grantees or clinics carrying out, are Title X funds used, and are any of these activities prohibited by Federal laws, regulations, or instructions?

   Activities in question include such actions as advertising, direct mailings, voter registration, telephone canvassing or "hotlines", or payment of dues to lobbying organizations.

4. Is there any evidence that Planned Parenthood

Federation of America used Title X funds or any other federal funds for political lobbying activity during 1980 or 1981? Are dues collected from Title X funded affiliate organizations considered "Federal funds" for purposes of lobbying prohibitions? Is there any evidence that grantees are able to increase their political activities using funds "freed" by the presence of federal funds?

USE OF TITLE X
FUNDS FOR ABORTIONS
OR ABORTION REFERRALS

1. What activities has HHS identified as allowable or unallowable relative to section 1008 and how has HHS informed Title X recipients of these? What guidance or instructions has HHS issued to Title X grantees for abortion referrals?

2. How does HHS monitor Title X recipients for compliance with section 1008 and what enforcement actions has HHS taken relative to section 1008 during the last few years? Do HHS' monitoring actions appear adequate to detect compliance with section 1008? How many organizations receiving Title X funds perform abortions either at the same location where Title X services are provided or at separate locations?

3. How many Title X recipients has HHS found to be using Title X funds for abortions or abortion related services, including referrals? Have you or HHS identified any Title X recipients performing menstrual extractions without

performing pregnancy tests which may, in fact, be abortions?

4. In testifying before this Committee in March 1981, you indicated that one Title X grantee--Planned Parenthood of New York City--may not have been in compliance with section 1008 restrictions and that you would be referring this matter to HHS' Inspector General for further evaluation. When did you make this referral and what actions has HHS taken?

5. What steps do Title X clinics that perform abortions or make abortion referrals take to comply with section 1008? Do such organizations account for abortions and abortion referrals separately?

6. To the extent information is readily available or ascertainable,

   -- How many clients are pregnant when they first seek services at typical Title X clinics? How many of these clients are 19 or under?

   -- What are the marital status, age, and race of the above clients who seek or receive pregnancy counseling?

   -- Of the Title X clinic clients who seek or receive pregnancy counseling, how many are referred for abortions?

   -- How many clients referred for abortions have had a previous abortion? Please

break down by age and marital status.

7. Is there any evidence that clinic counseling is structured or presented to favor abortions over other alternatives?

8. What internal guidance or instructions on abortion referrals have Title X grantees developed and given to their personnel?

9. What training have Title X clinic counselors received regarding problem pregnancy counseling, including abortion referral?

10. What educational materials about abortion are offered by Title X funded clinics?

11. What process typically leads to an abortion referral in Title X funded clinics?

12. Do any substantive differences exist in the proportion of clients referred for abortion or in educational materials used regarding abortion between public and private Title X grantees?

13. Are clients referred for abortion by Title X clinics offered follow-up counseling?

14. What steps have HHS and Title X grantees and clinics taken to implement section 931 (b)(1) of the Omnibus Budget Reconciliation Act of 1981? This section requires Title X grantees and contractors to encourage family participation in project operations.

EFFECTIVENESS OF TITLE X PROGRAM

As you know, many claims have been made by Title X program components of the program's effectiveness in preventing unwanted pregnancy. In fact, proponents have recently stated that the Title X program saves over $2.00 for every $1.00 spent. Yet, with regard to adolescents, illegitimacy rates, abortion rates, and incidents of premarital sexual activity continue to increase dramatically. There are several ways effectiveness might be gauged. These should include encouraging involvement of parents and other family members when working with adolescents, and supporting local community standards with regard to these issues. We recognize that an in-depth evaluation of the effectiveness of the Title X program could be very costly and time-consuming. However, we would like GAO to determine how the effectiveness of the program could be evaluated, either comprehensively in one study or in phases. Proper attention should be given to the cost-benefit ratio claimed by proponents and to other outcomes of the use of Title X funds with which society must contend. After you have completed such an assessment, we would like to discuss the best approach for conducting the evaluation.

If, during the course of your work, you should need further guidance or information, please contact either Dr. Craig Peery on the Staff of the Labor and Human Resources Committee or the Staff Director of the Aging, Family and Human Services Subcommittee, Miss Cynthia Hilton. Thank you for your cooperation.

Sincerely,

/s/	/s/
ORRIN G. HATCH	JEREMIAH DENTON
Chairman	Chairman
Committee on Labor and Human Resources	Subcommittee on Aging Family and Human Services

JAD:km:ca

Enclosures

[Appendices II and III omitted.]

[End of GAO Report]

Letter from Congressman John D. Dingell, Chairman, Committee on Energy and Commerce, United States House of Representatives, to Otis R. Bowen, Secretary, Department of Health and Human Services (Oct. 14, 1987)

U.S. House of Representatives
Committee on Energy and Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515

October 14, 1987

The Honorable Otis R. Bowen
Secretary
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Mr. Secretary:

It was with great disappointment that I read the proposed regulations for family planning clinics which were published in the Federal Register on September 1, 1987. The regulations appear to sanction excessive intrusion into the private operations of facilities which receive funds under Title X of the Public Health Service Act; they also appear to restrict unduly the activities which Title X recipients can conduct with federal monies. I would like to take this opportunity to express my concern that the Department has taken a very narrow view of the legislative history of Title X and has used its narrow view to construct a biased interpretation of congressional intent for the program. At a personal level, I protest in the strongest possible terms the misuse

of my Floor statement from the debate during passage of the original family planning legislation in 1970. I request that this letter and its attachment be included as part of the formal comments on the proposed rules.

The Background section of the proposed regulations purports to establish congressional intent for the family planning set out in Title X. To establish congressional intent, your Department quotes two sentences from the 1970 Conference Report on Title X and three passages from my Floor statement on the original enacting legislation. The Department has conveniently ignored the intervening 17 years of congressional action on this issue. Since my statement was made, the Title X program has been reauthorized six times and has been the subject of at least 7 other pieces of legislation. Restrictions similar to those in the regulations have been specifically proposed and rejected during this period. An accurate legislative history would reflect the entire record.

In addition to relying on an incomplete legislative history, the Department has also quoted passages from my Floor statement out of actual and historical context to imply things that were not said and which may not be reasonably inferred. My statement was made in opposition to the use of Federal funds to support or encourage abortion as a form of birth control. The statement did not suggest, either expressly or implicitly, that family planning clinics should be prohibited from counseling pregnant women on any matter or referring them to appropriate facilities. Nor did the statement support the imposition of record-keeping, distinct facility requirements, constraints on political activity, or the taking of a negative oath by clinics. The proposed regulations erroneously suggest that the statement

somehow supported these goals.

I regret that the Department has succumbed to political pressure to apparently misinterpret the congressional intent for Title X and to propose the current set of regulations. I had been hopeful that the Department would abandon this regulatory approach last February when the Department reprimanded then-Deputy Assistant Secretary Gaspar for circulating a memorandum which promoted what appeared to be Ms. Gaspar's personal agenda regarding Title X by using the same misconstrued reasoning as is used in the regulations. I communicated my views on these issues directly to you in a February 6, 1987 letter. Since the meaning of that letter was apparently unclear, let me state clearly for the Administration that I opposed Ms. Gaspar's attempts to restructure Title X, I oppose the current regulatory efforts to restructure Title X, and I will oppose such efforts to alter the program in the future.

Sincerely,

/s/

JOHN D. DINGELL
CHAIRMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE STATE OF NEW YORK, ET AL.,	:	
Plaintiffs-Appellants,	:	
- against -	:	**DECLARATION** Nos. 88-6204/06
DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,	:	
Defendant-Appellee.	:	

DECLARATION OF JOAN COOMBS

JOAN COOMBS states as follows:

1. I am the Executive Vice President of Planned Parenthood of New York City, Inc. ("PPNYC"), one of the plaintiffs herein. I make this declaration in support of plaintiffs-appellants' Motion for Stay and Injunction Pending Review on Writ of Certiorari.

2. PPNYC cannot and will not implement the new Title X regulations. To do so would be contrary to sound and established medical practice, would deprive women of the information to which they are entitled and which they need to make critical decisions about their health, and would violate the laws of the State of New

York.

3. Many of the Title X patients served by PPNYC, in accordance with Title X regulations, pay as much of the cost of the services they receive as they can afford. Under the new regulations these patients, paying in part with private funds, cannot receive the full counseling to which they are entitled under good standards of medical practice, the dictates of medical ethics, and the requirements of New York Law.

4. If the relief requested herein is not granted, PPNYC will, on December 1, 1989, lose $444,808 in Title X funding, or approximately 27% of the operating budget of its clinic at the HUB, its center in the South Bronx.

5. PPNYC does not have any cash reserve which could replace this loss. Nor can it pass the cost along to its patients. Raising almost $450,000 from the private sector--in addition to the nearly $4 million we must raise annually in order to avoid a financial loss and support our programs and services--would be virtually impossible.

6. If our Title X funds are withdrawn on December 1, PPNYC will face immediate chaos at its HUB clinic, cessation of services to many patients and the probable closing of the clinic, a clinic which, for more than a decade, has served medically indigent adults and teens at high risk of unintended pregnancy in one of the poorest congressional districts in the United States.

7. Because PPNYC's Title X program is closely integrated with related health services at the HUB clinic, its loss would have an impact far beyond the patients directly served with Title X funds. Loss of these funds would have a devastating effect on the ability of the

entire HUB center to function. Elimination of Title X funding from the varied but fragile foundation of public funding which supports many of the HUB's programs would, as a practical matter, result in the cessation not only of family planning services, but the dismantling of many other critical medical and non-medical services provided to this high risk population--AIDS testing and counseling, prenatal care, well baby care, comprehensive physical examinations, and vocational programs for out-of-school youth.

8. Approximately half of PPNYC's Title X grant supports a part of the cost of 36 employees, most of whom live in the South Bronx. Loss of the grant would, at a minimum, force immediate reorganization of the Center and the laying off of approximately 10-15 employees as well as per diem staff, including nurses and physicians (representing an additional cost of $47,000) who augment the family planning services provided by the regular staff.

9. Even with these cuts in its Title X program and staff, it is doubtful whether PPNYC could maintain its other programs and health services at the HUB if Title X funding were lost. Critical overhead expenses, including rent, telephone, medical liability insurance, and security guards, are funded proportionately with Title X funds.

10. The areas served by the HUB have been rocked by decades of neglect, unintended teenage pregnancy, low infant birthweight, crime, drug abuse, child abuse, deteriorating housing stock, and upwardly spiraling rates of school dropouts. In the midst of these grim indicators of the quality of life as it is lived in the South Bronx, the HUB acts as an oasis for medically

indigent young people and adults. It serves as a comprehensive reproductive health center, a learning center, and a recreation center. It is a safe place to come, for many it is the first stop on the way to comprehensive health services. The following are snapshots of the communities it serves:

Community District 1
(Mott Haven, Melrose, Port Morris)

Ninety-four percent of the 80,000 people living in this community are either Black or Hispanic; 30 percent are between the ages 5-17. The median income per family is $7,810, while 44 percent of these families live below the poverty line. More than 45 percent of the population receive some form of public assistance. In a recent study, Mott Haven recorded the highest percentage of teen births, at 67.9 percent, in the Community Board. In addition, Mott Haven has the worst record for prenatal care in New York City--more than 48 percent of the mothers who delivered in the community did not receive adequate prenatal care.

Community District 2

Ninety-seven percent of the population of this community is Black or Hispanic; the average median income is $7,200 and more than 54% of the population receives some form of income assistance. Until recently, the HUB had not been able to extend its services to the Hunt's Point area. But, in 1988, a National Priorities grant through Title X permitted PPNYC to institute a model, innovative outreach,

education, and intervention program here, focusing on teens at extremely high risk of contacting and conveying AIDS--prostitutes and teens engaging in IV drug abuse. Hunt's Point, which includes the New York City Terminal Market, is the largest outer-borough gathering spot for juvenile prostitutes.

Word of PPNYC's program has already reached into the community at large and we are beginning to see increasing numbers of Hunt's Point residents at the HUB. The teens for whom the program was developed are using the family planning services of the HUB clinic; several young women who had run away from home because they thought they were pregnant were reunited with their families after pregnancy detection tests and counseling.

Community District 3
(Morrisania)

Of the 54,000 individuals living in this community, 98 percent are either Black or Hispanic; 52 percent receive some form of income assistance; and 46 percent live below the federal poverty line. The average median income is less than $7,500 annually.

11. The HUB provided family planning services for 6,274 low-income women and teenagers in 1988. Of these, 2,317 were under 20 years of age. Many have been coming to PPNYC for years; many are referred by mothers, sisters, and friends who have used the HUB's services before. The HUB is a trusted community resource, not only for health services but for educational

programs and teen pregnancy programs as well. Even if there were other services to which these families, women, and teens could turn, there is no doubt that many would be lost in the transition. And, in the South Bronx, adequate alternatives simply do not exist.

12. The alternatives to the HUB clinic are Montefiore Family Care, Soundview Family Care, and The Martin Luther King Center, all smaller community health centers, and the Bronx municipal hospitals. Together the three small centers are not capable of absorbing PPNYC's client load; nor do they have PPNYC's commitment or expertise. The local municipal hospitals, Lincoln, Bronx Lebanon, North Central Bronx, and Bronx Municipal, are already overcrowded to the point of dysfunction.

13. Planned Parenthood of New York City's programs in the South Bronx are utilized by the community because they are of the highest quality. The program was comprehensively evaluated in 1986 and again in 1989 by a team of professionals from the Department of Health and Human Services. The site team's original report concluded: "The HUB program is an impressive program conceptually and is dynamic, well organized and implemented by a sensitive and caring staff." In 1989, most comments centered on how the HUB had become even more effective. The site team made clear in its exit interview that this is what a Title X program is supposed to be. Among the site team's comments in their written report in 1989:

ADMINISTRATIVE FINDINGS

"The agency is organized and well run."

"Excellent training programs are provided for staff and volunteers."

CLINICAL MANAGEMENT

"Since the last Title X Family Planning Program visit by the clinical reviewer in April 1986, the HUB has continued to improve their health services to their patients."

"The physical facility still impresses the visitor with its bright, clean and comfortable appearance."

COMMUNITY OUTREACH & EDUCATION

"An effective array of linkages has been established with a variety of organizations and programs in New York with whom the agency can refer for services, accept referrals from and present programs."

"A major ingredient which increases the effectiveness of what is essentially a small staff is the integrated manner in which program staff work together. The social service staff is an example of this. With a small staff, the influence of the program is felt across most program areas."

14. No other organization--if suddenly given the Title X grant monies that have supported the development of the HUB's clinic and outreach activities for many years--could replace a totally integrated program of such depth, effectiveness, and community acceptance. Indeed, it would require a start-up period of

at least 6 months to 1 year in order to provide minimum services. Programs of substance and quality are not built in one or even two years. It is not hard to imagine what would happen to the thousands of people served by PPNYC in the South Bronx. Many, if not most, would be lost in the shuffle--without services during the hiatus and at increased risk of unintended pregnancy, infection with the AIDS virus, sexually transmitted diseases, and low-birth weight babies.

WHEREFORE, I respectfully request that the court grant Plaintiffs-Appellants' Motion for Stay and Injunction Pending Review on Writ of Certiorari.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on:
November 10, 1989

/s/
JOAN COOMBS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK, ET AL.,

Plaintiffs-Appellants,

- against -

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Defendant-Appellee.

AFFIDAVIT

STATE OF NEW YORK)
:SS
COUNTY OF SCHENECTADY)

PAUL DRISGULA, being duly sworn, deposes and says:

1. I am Director of Planned Parenthood of Schenectady and Affiliated Counties ("PPSAC"). I make this affidavit in support of plaintiffs' motion for a preliminary injunction.

2. I have held my current position since 1982 and in this capacity, am familiar with the services provided by this agency and of the needs of our patients. Prior to my

current position, I was Director of Planned Parenthood of Northern New York. Based on my experience, I believe the current regulations would have a devastating impact on our continued ability to provide needed and vital family planning services to our clients.

A. PPSAC's Organization, Funding and Clients.

3. PPSAC serves five counties: Schenectady, Schoharie, Fulton, Hamilton and Montgomery. We have centers in Schenectady, Fulton, Schoharie and Hamilton.

4. In 1986, our total income was $1,502,600, thirty percent of which was from Federal and State funds. We received $73,407 in Title X monies and a total of $356,821 in combined monies from New York State local assistance and Title V, Maternal and Child Health ("MCH") monies. Medicaid family planning monies constituted approximately 9% of our income.

5. The four centers and headquarters of PPSAC currently have a total of 25 full time staff, and approximately 53 paid part-time staff. Positions include nurse practitioners, physicians, counselors, nurses, educators, administrators and support staff. During 1986, 90 trained volunteers provided an in-kind contribution of 5,946 hours, valued at $45,000, operating our rape crisis hotline for 8,760 hours. See para. 16, infra.

6. PPSAC provides comprehensive family planning services that include: reproductive health examinations; contraceptive services; counseling and referrals and community education; teen pregnancy programs and a rape crisis service. In addition, the Schenectady Center provides surgical services including first and second early trimester abortions.

7. In 1986, PPSAC served a total of 8,463 women, 24% of our patients were aged 18-19; 23% were under age 17. 84% of our patients receive subsidized care and fall 100-150% below poverty level.

B. SERVICES CURRENTLY PROVIDED BY PPSAC.

8. Many of our patients -- particularly our young patients -- come to PPSAC because they suspect they are pregnant. From July 1986 to June 1987, PPSAC performed 2930 pregnancy tests. When a patient tests positive, the counselor discusses the patient's feelings with her, all the options available to her, her family situation, including parental involvement (if appropriate), her financial status and future use of birth control. The counselor attempts to elicit and convey information in an honest, informative and non-judgmental manner to enable the patient to freely choose the option best suited for her. 55% of the patients diagnosed tested positive.

9. Patients receive at least three referrals for any service, including abortion. Among the referral sheets we distribute are lists of mental health counselors and therapists; ultrasound referrals; ob/gyn health care providers; prenatal referrals; nutrition/weight loss/weight control experts; urologists; surgeons; internists, family practitioners; fertility testing specialists; and abortion referrals. The information on each list includes the fees charged, the waiting time for an appointment and other relevant information, depending on the nature of the referral. Abortion referral information may include information regarding the distance to the abortion provider. We also distribute a brochure on adoption.

10. Between July 1, 1986 and June 30, 1987, 70%

of the patients who tested positive -- or 1119 patients -- were referred for abortion. In 1986, a total of 1253 patients were referred for abortion. Patients selecting abortion are given a fact sheet about early abortion, or mid-trimester abortion, depending on the situation. The sheets describe what abortion is, how it is performed, and possible medical problems that the patient may experience.

11. From July of 1986 through June of 1987, 885 of the patients chose abortion services at our Schenectady Center. 16% of these patients were under 18 years old. 234 chose abortion services elsewhere, or because of medical contraindications, were referred to other facilities. 16% of these patients were under 18 years old.

12. From July of 1986 through June of 1987, 336 patients chose prenatal care. Nine patients were interested in surrendering their babies for adoption. As part of our counseling, we provide brochures and information on prenatal care and postpartum care. We also distribute information on social services that are available to our patients. For example, we distribute information regarding the WIC program, which is a special supplemental food program for women, infants and children that is administered by the United States Department of Agriculture through the New York State Department of Health.

13. From July of 1986 through June of 1987, we received 1798 phone calls from women referred to us for abortion services. Of those, 1353 were scheduled for abortions [at] our Schenectady Center and 445 were referred to other abortion providers. Additional phone referrals we provided were: 68 women were referred for prenatal care; 7 women were referred to adoption

agencies; 138 people were referred to community agencies; and 48 men and women were referred for sterilization procedures.

14. Patients that are referred are asked to complete a confidential consumer feedback information form. This form is extremely beneficial in ensuring that our patients are referred to high quality providers. PPSAC regularly inspects the facilities to which patients are referred, utilizing private contributions and patient fees to evaluate the facilities.

15. Educational programs are an important facet of PPSAC's work. Our education programs include speakers, audio visual programs and printed resource materials. We also maintain a resource center. PPSAC provides training and education to many community professionals in the fields of health, social services and education. We also run human sexuality programs to a wide variety of groups including community, religious and educational facilities. Recognizing the sensitive and complex nature of the issues addressed in our programs, our educators attempt to provide their audience with current complete, accurate and non-judgmental information. Efforts are made to facilitate discussion and audience participation is encouraged. We attempt to address questions with precise information which will assist the questioner. Most importantly, we don't skirt the tough issues or avoid areas that are controversial. Abortion is regularly discussed, not as a method of family planning, but as a means of terminating an unintended or risky pregnancy. Because of our candid and informational approach, our education programs are well attended. Indeed, in 1986, 290 groups attended our programs, with a total number of 6183 people in attendance at these programs.

16. Teen pregnancy is a particularly acute problem because of the increased health risks to mother and child and the adverse social consequences of teen childbearing. Accordingly, PPSAC participates in and coordinates a variety of programs for teens to address the special family planning issues related to teens. For example, PPSAC participated in two multi-agency efforts to prevent teenage pregnancy and to help pregnant teens stay in school or develop vocational skills. These programs involve encouraging teens to use available community services and facilitating teen participation in those programs. We also work with the YWCA in Schenectady, which has a program for pregnant teens and young mothers.

17. PPSAC also runs a rape crisis service for the counties we serve. Our services include a 24-hour hotline, free counseling and support for legal, medical and emotional concerns of rape victims. As part of this service, rape victims may be provided with information regarding abortion-related services.

C. EFFECT OF THE CURRENT REGULATIONS.

18. As discussed above, PPSAC serves a clientele comprised mainly of low-income people who have no other family planning providers or other medical providers to which to turn.

19. Many of our clients visit PPSAC as a result of a pregnancy scare. Many, however, continue to rely on PPSAC as their medical provider irrespective of the outcome of their pregnancy test because they feel comfortable in our environment and confident of the quality of our services. Because of the full range of honest, professional and high quality services provided,

PPSAC is viewed as a source of information and help. The new regulations will make it impossible for us to maintain this reputation because they limit our ability to provide comprehensive services, counseling and referrals. Consequently, many patients who are now provided with testing for sexually transmitted diseases, with contraceptives, and with routine gynecological examinations will not benefit from those services. Others, who are now referred to other medical providers because of medical ailments detected by PPSAC, will remain untreated.

20. The regulations restrict us from providing necessary and appropriate counseling to a woman diagnosed as pregnant. Instead of assisting the woman in exercising her right to choose the option best for her, we would be limited to referring the woman to prenatal services. We could not advise the woman that she could obtain an abortion, nor could we provide her with information explaining the abortion procedure. Many of our patients are unaware that abortion is an option available to them, and thus, will be unable to make an informed choice.

21. The regulations compel us to tell a woman who inquires about abortion that we don't give referrals for abortion. The regulations therefore force us to indicate disapproval of abortion, although it is a safe and legal option. We will be placed in making the choice for the woman, instead of assisting her in making her own choice.

22. We will be barred from providing our descriptive and comprehensive fact sheets and referral sheets. Without this information, many of our patients will travel needlessly long distances to obtain services or

will contact providers who do not accept Medicaid. As a result, many of our patients may delay or encounter delays in obtaining abortions. Given that health risks increase if a patient receives an abortion after her first trimester, these delays may needlessly result in the health risks to our patients.

23. It is particularly shocking that in cases where pregnancy might enhance an illness, the regulations preclude us from referring a patient for an abortion or even telling the woman that she or the child, is at risk if she continues the pregnancy. This prohibition is unconscionable and will expose our agency and health professionals to potential malpractice liability.

24. Tragically, in 1986, 15 of our patients became pregnant as a result of rape. The regulations would prohibit us from advising these women of the availability of abortions. Similarly, our hot-line operators would be prohibited from telling victims that if they become pregnant, they can terminate the pregnancy. This knowledge assists some victims in regaining a sense of dignity and balance that is very difficult to achieve after the violent, degrading experience of rape.

25. The regulations would force us to discontinue providing services with our Title V funds, such as counseling on prenatal care and nutrition. We would be permitted to continue these services only by separating the facilities that provide pre-pregnancy services from prenatal care services. This is not only financially unfeasible, but would disrupt the continuity in care currently provided and from which our clients benefit.

26. We would also be forced to impose counseling promoting the health of the fetus to the woman who has

elected abortion, until the time of the referral appointment. Promoting childbirth in this situation is particularly inappropriate.

27. Separating the abortion services from the Title X funded services as required under the regulations would be prohibitively costly. Acquiring a facility and renovating it to make it acceptable for our needs and compliant with State and local codes would be an extremely expensive proposition. In 1979, we renovated an unused part of our existing building for surgical use. That renovation alone cost $82,000. Even assuming we could use some of our equipment in a new site, we would need to acquire a building which would probably cost between $75,000 and $100,000 for the building and additional costs for ample parking space. It would be unfeasible for PPSAC to shoulder these costs, together with the costs for inventory, equipment, furniture and duplication of staff with our full range of benefits.

28. If PPSAC ceased providing abortions and abortion-related services, the clients we serve would suffer. As set forth above, a large percentage of the patients diagnosed as pregnant by PPSAC and other providers rely on PPSAC for safe, high quality inexpensive abortion services. Indeed, there are no other local physicians that will accept Medicaid for abortion services. The only other local Medicaid providers that perform abortions are Ellis Hospital and Albany Medical Center. Both these hospitals, however, charge between $100 and $1000 more for an abortion than does PPSAC. In addition, as opposed to PPSAC's waiting time of between two to seven days, each has a waiting period of two to three weeks. Physicians and hospitals which do not accept Medicaid would be prohibitively expensive for our clients.

29. The extreme harm that our patients would suffer if we ceased providing abortion services is exacerbated because we provide services in a rural area to a rural population. Travel is difficult for many Medicaid patients. There is little transportation from many rural areas and the cost of transportation is prohibitive even if it is available. Many people receiving public assistance do not have cars or friends with cars that are able to travel any distance. Money for travel includes gas, tolls, meals, and child care. There are frequently no people to borrow from or help in any way. Many people also fear cities. Patients coming from a distance such as Utica on the bus frequently come alone as their friends are either providing childcare[,] money[,] or both. There can be bus delays in either direction, even worse, if the bus home is missed, there may be no money to spend the night out of town.

30. The regulations will also interfere with our ability to continue our educational programs from which our community benefits. The regulations would make discussion of abortion off-limits. This would be a real loss to our community since the availability of information on issues related to sexuality [and] reproductive health is limited. Absent an atmosphere of free discussion and free inquiry, attendance will wane.

30. As Director, I foresee that the regulations will jeopardize our ability to continue to attract outstanding health professionals and staff because they will not only be forced to breach their professional ethics by not providing necessary and appropriate options counseling but will also be exposed to potential liability.

D. CONCLUSION.

31. For the reasons set forth above, I respectfully submit that this Court should grant the relief requested in plaintiffs' motion.

/s/
PAUL DRISGULA

Sworn to before me this
14th day of December, 1987.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DR. IRVING RUST, ET AL.,	:	
Plaintiffs,	:	
- against -	:	**DECLARATION**
	:	88 CIV. NO. 0702
OTIS BOWEN, or his successor, Secretary of the United States Department of Health and Human Services,	:	(LLS)
Defendant.	:	

RAYMOND FINK deposes and says the following:

1. I am the Chairperson of the Medical and Health Research Association of New York City, Inc. (MHRA). As MHRA's Chairperson, I preside over its Board of Directors in establishing policy and directions for its provision of maternal and infant care, youth services and family planning and reproductive health care to the greater metropolitan population. A copy of my resume is attached hereto as Exhibit A.

2. I submit this declaration in support of plaintiffs' Motion for a Preliminary Injunction enjoining implementation of proposed regulations promulgated under Title X of the Public Health Services Act (Title X). I also submit this declaration in support of plaintiffs' request for an early hearing date. This declaration is

submitted in my official capacity as Chairperson of MHRA and in my professional capacity as an expert in community and preventive medicine.

3. The Medical and Health Research Association of New York City, Inc. has been a direct grantee of Title X Family Planning Funds since 1982. MHRA has 600 employees and its service divisions provided care to 42,000 pregnant women, infants, children, adolescents and their families in 1986 alone. The vast majority of these individuals were Black or Hispanic and over 90% had incomes at or below 150% of the federal poverty level. MHRA service projects are targeted to the low income-high risk population of New York City and approximately 60% of those served have no insurance and are thus, entirely dependent on the availability of high quality, low cost, community based health services such as those provided by MHRA and its subgrantees. For many of the individuals served by MHRA, Title X and like sources of funding permit them to enter into a health care system from which they might otherwise be barred by indigency and other factors.

4. In 1987, for example, MHRA received $2,104,950 in Title X funds from the U.S. Department of Health and Human Services (HHS) of which $430,549 was subgranted to plaintiff Planned Parenthood of New York City, Inc., $480,247 to Columbia Presbyterian Hospital, $466,241 to The Door (an innovative community based adolescent care program) and $668,076 was used by MHRA to provide covered services through its own service division, the Maternity, Infant Care -- Family Planning Projects ["MIC-FPP"]. MIC-FPP has been in operation since 1964 and has been administered

by MHRA since 1975.*

5. MIC-FPP receives funds from both the New York City and New York State Departments of Health, from the HHS and from some private sources. Federal monies include Title X funds for family planning, Title V funds under the Maternal-Child Health Block Grants, and Title XIX Medicaid reimbursement.

6. MIC-FPP is the largest maternal and infant care program in the nation. The prenatal patients we serve give birth to approximately 9,000 babies a year. Approximately 25% of these mothers are age 19 or under.

7. With a combination of funds under Titles V, X and XIX, MIC-FPP provides family planning services to approximately 20,000 clinic patients a year, 26% of whom are age 19 or under. With Title X funds it also provides counseling services in hospitals[,] schools and the community to 27,000 individuals, about 45% of whom are age 19 or under. Title X constitutes 5% of MIC-FPP's total budget.

8. MIC-FPP presently operates ten clinics. One of these clinics, the Tremont Clinic, receives Title X funds under the Public Health Service Act, as well as Title V funds. Many employees at Tremont are funded under both Titles X and V.

9. The Tremont Clinic provides prenatal care to approximately 1,200 patients per year; gives over 200 pregnancy tests to individuals who are not otherwise

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* $42,446 for Addabbo/PRYME Community Health Center and $17,391 for MHRA Administration of the grant.

registered patients; and offers family planning to approximately 2,400 patients in 4,700 visits per year. The clinic does not perform abortions. Consistent with the most recent Title X guidelines, however, clinic staff provide counseling and referral for abortion where indicated or requested. Referrals for abortion are made to one of fourteen back-up hospitals. Prenatal patients at Tremont receive amniocentesis and genetic testing referrals as well as follow-up counseling by clinic staff on the premises. Counseling in this context often involves a discussion of pregnancy termination as a treatment option in the event of adverse test results.

10. In addition to MIC-FPP's Tremont Clinic, it operates three community education programs which receive Title X funds:

(a) The In-Hospital Family Planning Program provides individualized family planning counseling to postpartum women before they leave the hospital. MIC-FPP family planning counselors are assigned to the obstetric/gynecologic in-patient units of affiliated hospitals. The counselor's function is to educate women on the advantages of planned pregnancy and to counsel on the available methods of family planning. Counselors also discuss well-baby care with mothers and help them select a source of pediatric care.

(b) The Teen Reach Program was established in 1978 to help prevent unwanted pregnancies among high school students and to help the students get family planning and health related services. MIC-FPP assigns health educators to each participating school. Their responsibilities include conducting classroom presentations and small group sessions, and providing individual counseling and referrals for teens in need of

health services.

(c) The Askable Parent Program provides parents with information so that they can provide sex education to their children. The Program targets parents in districts of New York City with the highest incidence of adolescent pregnancy. The Program is carried out by trained volunteer parent-leaders who conduct workshops with parents. The emphasis of the Program is on enhancing communication skills between parent and child.

11. The services which are offered by MHRA, its service divisions and subgrantees are uniformly accessible, effective, of high quality and in full compliance with current Title X guidelines and regulations.

12. I have studied the new regulations. In my professional opinion, and in the opinion of MHRA, these regulations will destroy our ability to provide high quality and effective services in accordance with ethical and legal norms designed to protect the health and dignity of our patients. The following are examples of how our clients and staff will be irreparably harmed should these regulations be implemented:

(a) MHRA will be unable to provide patients who cannot afford private medical care with the same treatment and information routinely provided by our physicians to their private patients.

(b) Our Title X-funded health care staff will be prevented from making medically sound referrals. The proposed regulations will compel physicians to: jeopardize the health and safety of patients; go against

New York State Article 28 requirements that all patients be informed of all available medical options; and disregard accepted medical and ethical standards of practice as promulgated by the American Medical Association, the American College of Obstetricians and Gynecologists, and the American Psychological Association among others.

(c) Our providers will be unable to respond appropriately to all inquiries by their patients although the freedom to do so is central to success in preventing unintended pregnancy. They will also be unable to emphasize in a meaningful manner, the importance of family planning and responsible sexual behavior to patients because to do so requires discussion of the success and failure rates of all contraceptive modalities and how these affect one's ability to avoid unintended pregnancy and unwanted childbirth.

(d) The new regulations restrict the ability of family planning personnel to provide medically ethical, comprehensive health care services and information even in cases where, although no "emergency" exists, a patient's health is in serious danger, thus inviting negligence and malpractice suits against family planning facilities and the physicians they employ. This will render Title X programs unable to attract and retain competent, high-caliber health care professionals. This, in turn, will be detrimental to our ability to serve patients responsively and effectively.

(e) The new regulations require that pregnant and non-pregnant women with otherwise similar medical problems be given radically different medical care and referral plans, since in the absence of an emergency, after a pregnancy is diagnosed, a patient may only

receive a prenatal referral, even if the medical problem is unrelated to the pregnancy. For example, while we might make an appropriate referral for a non-pregnant woman with a breast lump, we would be required to make an inappropriate referral of a pregnant woman with a breast lump to a prenatal service. To respond to any medical problem based solely on a patient's pregnancy status would be entirely inconsistent with sound ethical medical practice and could endanger the health and/or life of the patient.

(f) The regulations mandate that pregnant patients receive a biased referral list which may be inappropriate and unresponsive to the medical and psychological needs and circumstances of the patient. This may hinder the patient's own efforts to obtain appropriate, timely, medical care or abortion services.

(g) The regulations further require that Title X health care professionals give every pregnant patient information on prenatal care, thus affirmatively steering them toward the option of childbirth. This mandatory push in the direction of carrying to term may increase the rate of unwanted childbirth.

13. The separation requirements mandated by regulation 59.9 may effectively serve to shut down a considerable number of clinics that now receive Title X funds, by making it impossible for them to continue accepting funding. The loss of their services to the thousands of low-income women and teenagers now receiving them, can only result in greater numbers of unintended pregnancies and consequent abortions. Regulation 59.9 will have particularly deleterious effects on providers such as the Tremont Clinic which also provide comprehensive health services with non-Title X

funds. In our opinion, the effect of this section will be to:

(a) Create criteria for compliance which will in many cases be prohibitively expensive and operationally untenable. Clinics with comprehensive reproductive health services and even large metropolitan hospitals cannot provide for the degree of separation called for by §59.9. Many, if not most of such facilities have deliberately attempted to integrate services which are substantively related in the interest of efficiency and the overall convenience of staff and patients. Contrary to the implication of this proposed regulation, th[e] trend is toward compliance with this Title X's requirement of coordinated services and the maximization of limited financial resources; it is <u>not</u> a means of railroading pregnant women into the abortion choice.

(b) Affect the completeness of a patient's medical record at Title X-funded clinics, thereby having a negative impact on the quality of medical care which can be provided. Health care providers will have to keep separate medical histories and patient records for Title X family planning services and abortion or abortion-related services. A single patient may have two or even three separate charts. Thus, the health professional in a Title X-funded program will routinely be forced to reach decisions regarding the provision of family planning treatment based on what may be an incomplete medical history. This could result in the prescription of an inappropriate contraceptive modality which places the patient at risk of an unintended pregnancy or of some other harm.

(c) Disqualify Title X-funded programs which are located in facilities which provide, with non-Title X

funds, comprehensive maternity services and discuss the option of pregnancy termination in the context of providing routine genetics counseling or amniocentesis test results for the express purpose of permitting patients to prevent the birth of an infant with some genetic disability.

14. Finally, new regulation 59.10 will bar organizations receiving Title X funds from freely associating with advocacy or other groups of their choice, and could prevent those organizations from obtaining appropriate legal recourse in lawsuits seeking to ensure access to abortion-related information and services. It further precludes any non-pejorative mention of abortion or of medical indication for abortion, construing such speech as "advocacy" in contravention of the Title X statute. This prohibition seems to apply even to our use of non-Title X funds.

15. The Medical and Health Research Association is categorically opposed to the proposed regulations. In the interest of extricating preventive family planning services from a postulated "entanglement" with abortion and related services which does not in fact exist, HHS risks dismantling the Title X program and all it has accomplished.

16. The new regulations condition the receipt of much needed government funds on our agreement to waive constitutional rights and to act against the best interests of the patients we serve. Moreover, our health care staff is precluded from living up to the trust they rightfully cultivate in their patients. Patients and physicians in Title X-funded programs will be unable to communicate forthrightly and patients will thus be misguided, delayed or led to make dangerous or ill-

advised health care decisions.

17. These regulations will require that our medical and health personnel distort their professional judgment and withhold information from patients regarding their legal options and health risks. This is unethical. Moreover, it would subject us to malpractice exposure, severely curtailing our service delivery capacity.

18. For all these reasons, MHRA, on behalf of its service divisions, its delegate agencies, its staff, and the patients it serves, will be irreparably harmed if the regulations are not immediately enjoined.

WHEREFORE, I respectfully request that the Court grant plaintiffs' Motion for a Preliminary Injunction.

I declare under penalty of perjury, that the foregoing is true.

Executed on: 3 February 1988 /s/
RAYMOND FINK, Ph.D.

[Exhibit omitted.]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK, ET AL.,	:	
Plaintiffs-Appellants,	:	AFFIDAVIT
- against -	:	
DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,	:	88 Civ. 0701 (Stanton, J.)
Defendant-Appellee.	:	

Dr. Melita Gesche, being duly sworn, deposes and says:

1. I am Director of the Bureau of Reproductive Health of the New York State Department of Health ("NYSDOH") and have managed the Department's family planning program since 1969. I am also a physician duly licensed to practice medicine in New York State and I am board certified in preventive medicine. I submit this affidavit in support of plaintiffs' motion for a preliminary injunction.

2. The New York State Department of Health is vested with the responsibility of protecting and furthering the health and well-being of New York State's residents. (New York Public Health Law, subsections 201, 206).

Assessing and addressing the state-wide need for appropriate, effective family planning is an integral and important part of the NYSDOH's legislative mandate to oversee and ensure the provision of health services in New York State.

3. As I will discuss in detail below, and as was set forth in NYSDOH Commissioner David Axelrod's comments on the proposed regulations, included in the joint appendix at page 165A, the challenged Title X regulations pose a severe and far-reaching threat to the health and safety of New York State's residents who utilize the services of Title X supported providers, are inconsistent with well-accepted standards of medical care and New York State law and will have a disastrous effect on the provision of family planning services in New York State. In addition, the regulations will have grave financial and administrative consequences for New York State.

A. Overview of the State's Family Planning Services

1. The NYSDOH's Title X Grant

4. The NYSDOH, through its Bureau of Reproductive Health, is one of two Title X grantees in New York State. The other is the Medical Health and Research Association of New York City, Inc. ("MHRA"). As a grantee, the NYSDOH administers the yearly Title X family planning services project grant it receives from the United States Department of Health and Human Services ("HHS"). In 1987-88, the NYSDOH's Title X grant was $5,925,177.

5. The NYSDOH reviews applications from the family planning agencies currently subsidized by the

above HHS Title X grant seeking renewal of their Title X grants (virtually all of whom, also receive State grant funds). The NYSDOH Title X project grant funds 37 delegate agencies throughout New York State. The delegate agencies include hospitals, Planned Parenthood affiliates, community health centers, county health departments and other agencies. A list of those delegate agencies and the respective counties they serve is annexed hereto as Exhibit A.

6. Nearly 200,000 women were served by Title X subsidized family planning delegate agencies in 1986. Exhibit B annexed hereto contains data reflecting the number of women who utilized Title X subsidized agencies for the last three years. During that same time period, more than 75% of the patients seen in Title X subsidized projects were at or below 150% of the Federal poverty level. In 1986, for example, 79.5% of the women served by Title X subsidized projects were at or below 150% of the Federal poverty level.

7. In 1986, 70,000 adolescents in New York State used the services of agencies who were funded, in part, by Title X monies. Annexed as Exhibit C is a chart reflecting the total number of adolescents who have used the services of Title X delegate agencies in the last three years.

8. In administering this Title X grant, the NYSDOH is required to adhere to applicable federal law, regulations and guidelines. To ensure compliance, the NYSDOH frequently consults with the regional office of HHS. The "Program Guidelines For Project Grants For Family Planning Services" issued by the Bureau of Community Health Services ("BCHS") that have been operative and with which NYSDOH has complied are

part of [the Second Circuit] joint appendix at page 24A. The NYSDOH is "held responsible for the quality, cost, accessibility, reporting and performance of its delegate agencies." See Joint Appendix, page 28A § 6.1. Title X funding is contingent upon compliance with federal regulations and guidelines.

9. The NYSDOH has divided New York State into six health regions. Each region has one family planning nurse who provides ongoing monitoring and technical assistance to the delegate agencies in that nurse's region. In addition, the NYSDOH monitors and assesses the family planning needs in the state and works with the delegate agencies to ensure that those needs are addressed. An advisory committee, composed of Title X subsidized delegate agencies and other providers of family planning services in New York State meets informally on a regular basis to study and discuss policy and programmatic issues related to the provision of family planning services.

2. Other Funding For Family Planning Services In New York State

10. Annexed hereto as Exhibit D is a chart reflecting the decreased levels of funding of the Title X program in New York State from 1978 to 1988. In 1978-79, total funding of all then New York State grantees was $9,339,368; for 1987-88, the current program year, total funding is $8,027,967. Title X funding has not been adjusted for inflation, nor for the growing need for family planning services. Although the NYSDOH now receives more Title X monies than it did in the past, that is the result of the consolidation of other project grants; i.e., there are fewer direct grantees now than in the past. Indeed, the entire New York State's 87-88 grant is 21.5%

below the funding level received in 1980-81.

11. As reflected in Exhibit D, state funding has replaced Title X as the major source of monies for family planning services. State local assistance for the 1987-1988 calendar year was $11,150,000. Other state subsidized funding includes direct aid to localities when applicable and Medicaid. The state's funding of family planning services is consistent with its obligation and commitment to provide comprehensive health services to its residents and its recognition of the critical need for family planning services throughout the state.

12. The NYSDOH also receives a grant under the Maternal and Child Health Services ("MCH") Block Grant, Title V of the Social Security Act, 42 U.S.C. § 701. Exhibit D shows the amount of dollars ($1,368,888) from the 1987-88 MCH Block Grant that the NYSDOH uses directly for family planning services. The purpose of this grant, which is distributed by the NYSDOH to agencies throughout the State, is to promote the health of mothers and children. In furtherance of Title V's objectives, services recipients of MCH Block funds may provide genetic counseling and amniocentesis.

B. Impact of the Regulations on New York State

1. The Health Threat to Women Served by Title X Funded Agencies

13. Because they ignore basic principles of sound medical practice, the new regulations pose a serious and immediate threat to the health and safety of the nearly 200,000 women in New York State currently served by Title X subsidized agencies.

14. Because of the regulations' restrictive definition of permissible family planning services, the Title X counselor is essentially proscribed from counseling a patient once that patient is diagnosed as pregnant. Hence, the regulations force the provider to cease providing services to the pregnant client without addressing the medical, social and educational needs of that client. This prohibition is contrary to accepted standards of medical practice which recognize the necessity of continuity of care, and would affect services the provider would render even with state funds.

15. Further, the regulations would bar the Title X agency from providing the pregnant patient with complete and comprehensive information regarding the full range of options available to her. The Title X subsidized agency would not be able to refer or counsel the patient regarding all her options nor provide the patient with descriptive information to aid her in making a decision. Instead of providing the patient with appropriate or necessary counseling, the Title X subsidized agency would be restricted to handing the patient a list of names weighted in favor of health care providers who provide prenatal care. This again patently violates all tenets of sound and ethical, medical practice, which, as codified in the State's public health law on informed consent, require health professionals to disclose to patients all risks, benefits and alternatives to a particular mode of treatment. Public Health Law §2805-d.

16. The bar against counseling a pregnant woman is so extreme that it applies even where the woman's health is at risk. A pregnant woman suffering from cancer, AIDS, or diabetes cannot receive counseling regarding the risks if she continues the pregnancy. The Title X subsidized provider is permitted only to refer the ill

patient to a specialist, which may result in delay injurious to the woman's health. In these situations, the denial of necessary information is particularly injurious.

17. In November of 1987, the NYSDOH began a statewide study to assess the rate of HIV infection in the population. Preliminary results from testing of blood samples from infants indicates an alarming HIV infection rate among women of childbearing age in New York State, particularly in New York City. Projections based on the early results of these tests indicate that more than 2,300 HIV infected women will give birth and an estimated 1,000 infected infants will be born in New York State in 1988. The NYSDOH is notifying physicians and family planning providers of these preliminary findings and urging them to counsel women regarding the risk of HIV infection. Copies of the letter sent to health care providers and the preliminary findings are annexed hereto as Exhibits E and F. A copy of a letter sent to family planning providers in New York State, annexed hereto as Exhibit G, similarly emphasizes the State's concern about HIV transmission. The NYSDOH is requiring that state subsidized family planning providers offer HIV counseling and testing. The new regulations will bar appropriate options counseling to HIV infected women, whose risk of developing full blown AIDS may be enhanced by the pregnancy.

18. The separation requirements contained in 42 C.F.R. § 59.9 threaten the continued viability of many of the Title X subsidized agencies in New York because of the administrative costs, increased costs for property and property insurance, increased costs of personnel and the like. Most hard hit will be rural areas, in which the Title X subsidized clinics serve large areas and where

duplication of services would be financially and administratively unfeasible. Consequently, the regulations jeopardize the availability of family planning services to women in New York State, particularly in its rural areas.

2. Impact on Adolescents

19. The regulations pose an acute threat to the health and well-being of the State's nearly 70,000 adolescents served by Title X subsidized agencies, the vast majority of whom are poor. Nowhere is the need for comprehensive family planning services greater than with adolescents. The health dangers posed by the new regulations are even greater in the context of teens who are physically and emotionally fragile, largely uneducated and without other available resources.

20. The adverse medical and social consequences of teenage childbearing require increased family planning services for adolescents. As described in a recent study by the Centers for Disease Control, annexed hereto as Exhibit H, New York State witnessed a 27.5% reduction in pregnancy rates in sexually experienced teens aged 15-19 between 1974-1980. This was the highest rate of decrease in the country of the states surveyed. Nonetheless, as reflected in Exhibits I and J, urban areas in New York State experienced a rise in pregnancy rates for this period. By limiting the information available to teens who rely on Title X subsidized agencies and by making it impossible for Title X subsidized agencies to provide comprehensive services, the regulations will have a deleterious effect on teenage pregnancy and teenage health.

3. Financial Impact of the Regulations

21. Implementation of the regulations would further drain the limited resources of the state, which already largely fund the family planning programs in New York State. Because the regulations conflict with state law and with well settled standards of professional conduct see paragraph 15, ante, agencies would be forced to choose between State and Title X funding. Replacing Title X funds will indeed be costly to the state. Even if the state law provisions explained in paragraph 15 could be ignored and agencies could receive both federal and state funding, the regulations would still increase costs of the state. For example, the regulations' separation requirements would prove so financially and administratively burdensome for many Title X recipients that they may choose either not to comply with those requirements or to provide only restricted services under Title X. Either choice will impose a financial burden on the state which may have to replace either the abandoned money or service.

22. Similarly, agencies which receive Title X funds and MCH Block Grant and state monies, see paragraphs 11, 12, ante, would have to choose between those two types of funding. MCH Block funds are to be used for prenatal, postpartum and delivery services. Under the new regulations, however, Title X recipients would not be able to provide postpartum services at the Title X subsidized clinic. Nor would the agency be able to engage in MCH Block prenatal services such as genetic counseling or amniocentesis, which may result in counseling involving options, or participate in the state funded new prenatal care initiative intended to decrease infant mortality.

23. The State would also be financially and administratively burdened by the new regulations as a result of their effect on the state's Certificate of Need ("CON") process. (N.Y. Public Health Law § 2802). Separation of family planning services from post-partum counseling would require an application under the New York CON process. While the process can be expedited to reduce dislocation and cessation of services, it can be expected to result in some interruption of services. Separate service entities would certainly lead to duplication of costs.

C. Conclusion

25. For the reasons set forth above, I respectfully submit that the requlations will have a devastating impact on the family planning program in New York State.

/s/
Dr. Melita C. Gesche

Sworn to before me this
10th day of November, 1987

[Exhibits omitted.]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK, ET AL.,
Plaintiffs,
- against -
OTIS R. BOWEN, et al.,
Defendant.

AFFIDAVIT
88-Civ-0701 (LLS)

DR. IRVING RUST, ET AL.,
Plaintiffs,
- against -
OTIS R. BOWEN, ET AL.,
Defendant.

AFFIDAVIT
88-Civ-0702 (LLS)

STATE OF NEW YORK)
: SS:
COUNTY OF ALBANY)

SHIRLEY GORDON, being duly sworn, deposes and says:

1. I am Executive Director of Family Planning Advocates of New York State, Inc. ("FPA"), a non-profit corporation formed in 1977 to lobby on behalf of

consumers and family planning agencies in New York State regarding reproductive health care issues. FPA is a membership organization, composed [of] over 250 family planning clinics, health and human service providers, providers of reproductive health care as well as consumers. Our organization regularly conducts providers' surveys of to determine access to reproductive health care th[r]oughout the State.

2. I submit this affidavit in support of plaintiffs' cross-motion for summary judgment and in opposition to defendant's motion for summary judgment.

As FPA's Executive Director, I am familiar with the acute shortage of subsidized, low-cost family planning and abortion services in New York State. If implemented, the challenged regulations will effectively block many women's access to and exercise of their choice of abortion.

3. Section 59.8(a)(3) of the challenged regulations prohibits Title X clinics from including on the list of referral providers "health care providers whose principal business is the provision of abortions." By excluding from the list all providers who principally provide abortions, the Department of Health and Human Services is effectively excluding all abortion providers that poor women have access to and can afford. While the regulations allow hospitals and private physicians to be on the referral list, as explained below, neither are affordable or accessible to poor women, particularly those in upstate and rural New York.*

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* As used in this affidavit, the term "rural" applies to counties so designated by the New York State Rural Resources Commission.

4. The availability of abortion outside New York City is limited even for those women who are not poor.

5. Almost 40% of abortions throughout the State are performed outside New York City. The distribution of abortion services is markedly concentrated. 80% of those abortion, are performed in ten counties, four of which are actually part of the greater metropolitan area. Those counties are: Albany, Broome, Monroe, Erie, Onondaga, Oneida, Nassau, Suffolk, Westchester and Rockland.

6. According to 1986 statistics compiled by the New York State Department of Health ("Vital Statistics of New York State"), there were no abortions reported in thirteen rural counties. But residents in those counties, traveled beyond their home counties to obtain abortions. The shortage of abortion providers in rural and upstate New York and the effects of that shortage are most acutely felt by poor women, such as those served by Title X clinics. Many private physicians and hospitals simply do not or will not serve this population, or for the other reasons described below, are not accessible to poor women.

7. Particularly in upstate rural counties, cost is a major barrier to poor women obtaining abortions from private physicians and hospitals that do not have low out-patient services. In upstate and rural New York, the few hospitals that perform abortions may charge as much as $1400 for a first trimester abortion. Private physicians doing in-office procedures generally charge less than hospitals for the first trimester but are nonetheless prohibitively expensive for uninsured and underinsured women because a significant number do not accept Medicaid and virtually none offer [] services at a reduced

fee. Clinics, including those that are funded in part by Title X, accept Medicaid, and for people who are uninsured, will provide first-trimester abortions at substantially lower costs, accept Medicaid and fees are all generally inclusive of more than just the surgery. In general, first-trimester fees at such clinics range from $100-$300 in upstate New York.

8. Poor women and families that are either Medicaid ineligible, have not applied for Medicaid, or are waiting for benefits to be implemented (discussed below) are frequently otherwise uninsured. The fastest growing number of New York State's uninsured reside in its rural counties. Private health insurance is generally obtained through an employer. In rural New York State, as is the growing trend nationwide, heads of families, particularly single mothers, often work at jobs that offer no insurance at all. Teens are frequently uninsured; even when the head of the family is insured, that insurance does not cover dependents or the plan does not subsidize the cost of monthly premiums for family coverage. (And of course, many teens are effectively uninsured because they do not or cannot discuss pregnancy with their parents and cannot benefit from their parents' insurance). Without insurance, referral to a hospital or private doctor, would be of no benefit to the Title X patient seeking an abortion.

9. Women who are Medicaid eligible may nonetheless not be recipients. This is particularly true of young women who, until their pregnancy (or pregnancy scare) are not receiving any health services. The application process for Medicaid take[s] up to two months. Some poor women cannot negotiate the complicated process; others first apply when they become pregnant. A Medicaid eligible pregnant woman seeking

an abortion would therefore need a referral to a clinic she could afford and not a referral to a prohibitively expensive hospital or physician as could appear on the list. If the woman had to wait to become Medicaid eligible, before obtaining her abortion, her health risks would increase.

10. Private physicians frequently impose other restrictions on their provision of abortion services. Many, precisely because they do not "principally" provide abortions, do not accept new patients for abortions. Referrals to such physicians would thus be pointless. Many physicians have or impose other restrictions such as requiring parental or spousal consent before performing an abortion.

11. Few upstate private physicians will perform second trimester abortions, or in fact, even late first trimester abortions. Many perform abortions only up to ten weeks. Second trimester abortions, if performed, are even more expensive than first trimester abortions. The type of providers to whom referrals are barred under the regulations are more likely to perform late first-trimester and early second trimester abortions at lower rates.

12. In upstate and rural New York, distances between abortion providers are a further barrier to the ability of poor women to obtain abortions. Excluding abortion providers from the list (and effectively forcing Title X clinics to cease providing abortions under §59.9, as discussed below) means that women will not be aware of potential nearby providers and will travel longer distances than necessary to obtain an abortion. Delays in obtaining abortions will result in increased health risks to women. In addition, delay will result in potentially substantial increased costs. If the delay pushes the

patient to her second trimester, the cost of an abortion--if she can locate a provider--at that stage may cost between $700 and $1500. For example, Albany Medical Center charges as much as $1500 for an abortion in the twentieth week.

13. It is extremely difficult for poor women in upstate and rural New York to travel outside their counties to obtain abortions. St. Lawrence County for example, has no abortion services and no public transportation. In fact, very little of upstate and rural New York has public transportation and that which it has, is expensive. Traveling to providers therefore means finding a car, carfare, childcare, in many cases, overnight accommodations and missing work for a couple of days. For example, while a hospital might accept Medicaid, under New York's cost containment regulations, first trimester abortions must be ambulatory. Thus, the Medicaid eligible woman who travels several hours to a hospital must herself pay for overnight accommodations. This, of course, is expensive and cumbersome.

14. Hospitals and private physicians generally do not maintain the evening and Saturday hours of clinics that serve predominantly poor women and teenagers and recognize the special needs of that population. Hospitals and private physicians rarely schedule appointments on Saturdays or evenings to comport with schedules of workers, such as housekeepers, paid on a per diem basis who do not have the license or money to take days off of work. In addition, hospitals and private physicians generally have longer waiting periods for obtaining abortions.

15. In addition to other factors which make hospitals an improbable or inaccessible source of

abortions for poor women, problems related to confidentially and visibility are greater -- or perceived to be greater -- in the hospital setting. Women in small rural and upstate communities are reluctant to go to hospitals for abortions, fearing that they will be seen by neighbors or hospital staff. Referrals to clinics that principally provide abortions do not generate this fear or embarrassment.

16. Lack of confidentiality is also a problem for women who must travel to distant providers, as discussed above. Because the woman will be compelled to stay overnight, she will likely have disclose[d] to others her intent to obtain an abortion. For many women, especially teens, this disclosure is a problem. Again, limiting the referral list and excluding possible providers thus unnecessarily adds to this problem.

B. <u>The Effects of §59.9's "Program Integrity" Requirements</u>

17. As described, there is already a severe shortage of providers of abortion services in New York State. And, as discussed above, the shortage is most acute for poor women. To the extent that the regulations will cause Title X clinics to cease providing abortions with non-Title funds because of the costs involved in separating their facilities, the regulations will further limit the availability of affordable safe abortion to poor women and will make it more difficult--if not impossible--for women to exercise their right to choose abortion.

C. <u>The Overall Effect of These Regulations</u>

18. The more than 100 family planning clinics in New York State that are funded, in part, by Title X

funds provide otherwise unavailable health care services to poor women. The regulations will have a devastating impact on those clinics' ability to provide comprehensive services, including appropriate counseling and referrals.

Conclusion

For the reasons set forth above, I respectfully submit that plaintiffs' motion should be granted and defendants' motion should be denied.

/s/
SHIRLEY GORDON

Sworn to before me this
3rd day of February, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DR. IRVING RUST, ET Al.,	:	
Plaintiffs,	:	
- against -	:	DECLARATION
		88 CIV. NO. 0702
OTIS BOWEN, or his successor, Secretary of the United States Department of Health and Human Services,	:	(LLS)
Defendant.	:	

STANLEY K. HENSHAW, Ph.D., deposes and says the following:

1. I am Deputy Director of Research for the Alan Guttmacher Institute (AGI) in New York City. A copy of my resume is attached hereto as Exhibit A. AGI is an independent non-profit corporation involved in research, policy analysis and public education in the field of reproductive health care services. AGI collects original data on the delivery of family planning and abortion services in the United States. Reports on these subjects are published periodically. AGI statistics have, since 1975, been accepted by the Census Bureau as the most complete statistics on abortion in the United States, and are published each year in the Statistical Abstract of the United States. The United States Centers for Disease Control, which is part of the Department of Health and

Human Services, also publishes abortion statistics, but acknowledges that AGI's figures are more complete.

2. As Deputy Director of Research, I am responsible for overseeing a periodic survey of all abortion providers in the United States, including over 2,600 hospitals, free-standing clinics, and doctors who provide abortions in their offices. In this capacity I analyze and interpret demographic data relevant to this case. A list of some of my significant publications related to abortion and adolescents follows:

Henshaw, Binkin, Blaine and Smith, A Portrait of American Women Who Obtain Abortions, 17 Fam. Plan. Persp. 90-96 (1985).

Jones, Forrest, Goldman, Henshaw, Lincoln, Rosoff, Westoff and Wulf, Teenage Pregnancy in Developed Countries: Determinants and Policy Implications, 17 Fam. Plan. Persp. 53-63 (1985).

Henshaw, Forrest and Blaine, Abortion Services in the United States, 1981 and 1982, 16 Fam. Plan. Persp. 119-27 (1984).

Henshaw, ed., Abortion Services in the United States, Each State and Metropolitan Area, New York, N.Y. The Alan Guttmacher Institute (1983).

Henshaw and O'Reilly, Characteristics of Abortion Patients in the United States, 1979 and 1980,[] 15 Fam. Plan. Persp., 5-16 (1983).

Henshaw, Forrest, Sullivan and Tietze, Abortion Services in the United States, 1979 and 1980, 14 Fam. Plan. Persp. 5-15 (1982).

S. K. Henshaw, Forrest, Sullivan and Tietze, Abortion 1977-1979: Need and Services in the United States, Each State and Metropolitan Area, New York, N.Y. The Alan Guttmacher Institute (1981).

Forrest, Hermalin and Henshaw, The Impact of Family Planning Clinic Programs on Adolescent Pregnancy, 13 Fam. Plan. Persp. 109-116 (1981).

Henshaw, Forrest, Sullivan and Tietze, Abortion in the United States, 1978-1979, 13 Fam. Plan. Persp. 6-18 (1981).

3. I submit this declaration in support of plaintiffs' Motion for a Preliminary Injunction enjoining the implementation of proposed regulations promulgated by the United States Department of Health and Human Services (DHHS) under Title X of the Public Health Service Act (Title X). This declaration is based on data AGI has collected and analyzed, and based on my familiarity with the studies in this area. It is my expert opinion that the proposed regulations will irreparably harm women, particularly teenagers and poor women, who want to have an abortion. By prohibiting Title X-funded clinics from referring women to abortion providers, these regulations will create an insurmountable obstacle for many women: that of locating an affordable provider.

4. My opinion is based in part upon the results of a recent AGI national survey of all known abortion providers. This survey, covering the years 1984-1985 and fielded in 1986, is the ninth such survey conducted by AGI. The survey's findings are summarized in Henshaw, Forrest, and Van Vort, Abortion Services in the United States, 1984 and 1985, 19 Fam. Plan. Persp. 63 (Mar./Apr. 1987) (Exhibit B).

5. Although the annual number of abortions has stabilized since 1982, the number of abortion providers has declined significantly over the last few years. For example, in 1985 there were 5 percent fewer providers than in 1982. This decline in abortion availability has been concentrated in counties having only a few providers with small caseloads.

6. The geographic distribution of abortion providers is markedly uneven. Many women who live in rural areas reside in counties which have no facility that provides abortions. In 1985, 82 percent of U.S. counties had no identified abortion provider, and 30 percent of the women aged 15-44 live in these counties. Although women who live in counties that lack facilities can travel to another county, the need to travel can impose substantial hardships, especially on teenagers and low income women. Furthermore, the mere presence of a provider does not assure that a woman can obtain an abortion in her county of residence. Even in some counties which have providers availability of services may be limited if private physicians only serve their existing patients, or if providers are willing to provide abortions under limited or rare circumstances.

7. In New York State, there are 16 counties with no known abortion providers. An additional four counties each have one hospital which provides abortions only under extraordinary circumstances; these hospitals provide fewer than five abortions a year. More than one-quarter of a million women aged 15-44 live in the 20 counties with no or virtually no abortion services. On the basis of national abortion rates, one can estimate that between three and six thousand women in the 20 counties seek abortions each year and need information about where services can be obtained.

8. In many U.S. counties, a hospital is the only facility where an abortion can be obtained. Physicians in small communities may decide that the existing demand for the procedure does not warrant their equipping their offices to provide abortion services and such doctors may, therefore, prefer to use hospital facilities. In addition, hospitals are needed for instillation abortions and for high-risk patients. However, the 1986 survey showed that although hospitals constituted 44 percent of all known abortion providers, they were responsible for only 13 percent of the procedures performed in 1985. Furthermore the number of hospitals known to provide abortions has declined by 15 percent between 1982 and 1985. The reduction was somewhat larger among public facilities than among private ones (20% vs. 14%).

9. Large scale abortion providers (400 or more abortions per year) may be more prominent and thus more easily identified by patients. The presence of such facilities is a better indication of service availability by county than just the presence of providers of any size. The 1986 survey reveals that 92% of counties, where 43% of women live, have no such large-scale facility. Among non-metropolitan counties, 99% have no large-scale providers, and 91% have no abortion providers at all. Seventy-nine percent of all non-metropolitan women live in counties with no providers.

10. Although metropolitan counties are better served, coverage is far from complete: 65% have no providers that report at least 400 abortions per year, and half have none.

11. Though a provider may exist in an area, this does not assure that all women who need abortions will be able to obtain them. Abortion providers vary to some

degree in their policies and the specific services they offer, and 57% report that they do not perform abortions after the first trimester of pregnancy. Large clinics (a caseload of 2,500 or more) and those that operate for profit are more likely to perform second-trimester procedures than facilities with caseloads of less than 1,000. Hospitals are also more likely than private physicians to perform abortions at later gestations.

12. The new regulations impose a referral to prenatal or delivery services on every pregnant woman; referral is to be made by providing each woman with a list which is required to be weighted in favor of childbirth. This referral list cannot contain facilities which "principally" provide abortions. Seventy percent of all abortions in this country are performed at clinics which would likely be included within this definition or at clinics having no obstetrics services. Hospitals which provide abortions do so at costs which are prohibitive for most Title X patients. Many of the smaller metropolitan areas thus have no affordable abortion provider eligible for inclusion on the mandatory referral list.

13. Many women delay seeking abortions until their second trimester. There are several reasons for this. Some women only recognize that they are pregnant after several weeks or even months of gestation. Some have medical reasons which delay their decision. Other women who terminate their pregnancies do so after 12 weeks (10% in 1983).

14. Teenage women are even more likely to postpone an abortion until they are in the second trimester of pregnancy than are adult women. A recent report published by the U.S. Centers for Disease Control shows that adolescents, especially young adolescents, are

more likely to obtain abortions at later weeks of gestation when abortions increase in risk. Nationally, only 33% of abortions obtained by teenagers younger than 15 are performed at eight or fewer weeks of gestation, compared to 39% among 15-19 year olds and 54% of abortions to women aged 25-29. Fifteen percent of teenage women, nationwide, obtain abortions after 12 weeks, compared to nine percent of women age 20 and over. Tedd V. Ellerbrock et al., "Abortion Surveillance, 1982-1983," U.S. Centers for Disease Control, in CDC Surveillance Summaries, February 1987. MMWR 1987; 36 (No. 1ss).

15. By making it even more difficult to locate an affordable provider the Title X regulations will delay women seeking abortions to even later gestational ages.

16. Gestational age is an important determinant of abortion complications for all women. The mortality risk of abortion increases with advancing gestational age. At 13-15 weeks gestation, the risk of death from a second trimester procedure is 9 times as great as for a first-trimester abortion performed at 8 weeks or earlier, and abortions at 16 weeks carry a 24 times greater risk of death. Grimes, Second-Trimester Abortions in the United States, 16 Fam. Plan. Persp. 260-265, 263 (Nov./Dec. 1984). In addition, the tendency for teenagers to obtain abortions later in pregnancy has the largest single effect on the morbidity and mortality rates for abortion in this population. Cates, Adolescent Abortions in the United States, 1 J. of Adol. Health Care, 18-25, 20 (1980).

17. The proposed Title X regulations will affect a large number of women. According to the Department of Health and Human Services, Title X supports 3,900

family planning service sites. The most recent available data (1983) indicate that there are about 5,100 organized family planning clinic sites in the United States. These figures indicate that Title X, in whole or in part, funds 76 percent of these sites. The Alan Guttmacher Institute, Organized Family Planning Services in the United States, 1981-1983, New York, 1984. Data available from 1983 also indicate that 4,966,000 women were served in family planning programs that year. Id. Assuming that the caseloads of Title X clinics are similar to those of non-Title X clinics and that the number of women served in 1987 approximates the 1983 figures, about 3.8 million women (76 percent of the total) are served by Title X clinics.

18. In 1983, four-fifths of the contraceptive patients in organized family planning clinics had incomes below 150 percent of the official federal poverty level. Id. Under Title X, those under the official poverty level receive free services, and those with incomes between 100 and 250 percent of the poverty level pay on a sliding scale. Most of the women affected by the proposed regulations thus have low incomes and many of these women do not have the funds to pay for unsubsidized family planning services.

19. The most recent data (from 1983) also reveals that it can also be difficult to locate a family planning provider. During 1983, 2,462 different agencies were involved in the delivery of family planning clinic services. The provider agencies had organized family planning programs in 76 percent of the 3,135 counties in the United States. In that year there were an estimated 417,000 low income women under age 45 and 249,000 women under age 20 of all income levels at risk of unintended pregnancy who lived in the 757 counties that

had no organized family planning clinic services. Moreover, in eight percent of metropolitan counties where there were 117,000 low-income women and 79,000 teenagers in need, organized clinic programs were unavailable; while in 29 percent of the non-metropolitan counties with 300,000 low-income women and 171,000 teenagers at risk, there were no organized services.

20. Even without the proposed restrictions on Title X, there is a high incidence of unintended pregnancy particularly for teenagers. In 1982, for example, there were 3.3 million unintended pregnancies resulting in 1.3 million births, 1.6 million abortions and 0.4 million miscarriages. Teens, in particular, have an especially high risk of unintended pregnancy. In this same period, there were over 960,000 such pregnancies, resulting in 405,000 births, 430,000 abortions and 125,000 miscarriages.

21. It is my expert opinion that the proposed Title X regulations will irreparably harm women who seek reproductive health care at clinics receiving Title X funds. These women will be unable to obtain a referral to an abortion facility. For some of these women, particularly teenage women, locating an abortion provider on their own will subject them to increased risk of morbidity and mortality because pre-existing delays in seeking abortion services will be exacerbated by the necessity to search for a provider. Many of these women will be delayed into the second trimester of pregnancy while others may be deterred from terminating pregnancy altogether. Further, the regulations will have a disproportionately adverse effect on low-income women and teenagers who may be unable to locate or travel to an affordable, non-Title X-subsidized family planning provider where complete, non-directive

counseling, referral and information will be available. For these reasons, some of these women, at high risk of unintended pregnancy, will carry unwanted pregnancies to term.

WHEREFORE, I respectfully request that the court grant plaintiff's Motion for a Preliminary Injunction.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on:
February 5, 1988 /s/
Stanley K. Henshaw, Ph.D.

[Exhibits omitted.]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK, ET AL.,	:	
Plaintiffs,	:	**AFFIDAVIT IN SUPPORT OF PRELIMINARY INJUNCTION**
- against -	:	
OTIS BOWEN, or his successor, Secretary of the Department of Health and Human Services,	:	**88 Civ. 0701 (Stanton, J.)**
Defendant.	:	

STATE OF NEW YORK)
)SS.:
COUNTY OF NEW YORK)

STEPHEN C. JOSEPH, M.D., being duly sworn, states:

1. I am the Commissioner of Health for the City of New York and a member of the Board of Directors of the New York City Health & Hospitals Corporation. I submit this affidavit in support of plaintiffs' motion for a temporary restraining order and/or preliminary injunction enjoining implementation of the regulations promulgated under Title X of the Public Health Service Act ("Title X").

2. The New York City Department of Health is vested with the responsibility of, among other things, ensuring the continued availability and accessibility of quality reproductive health care to all New York City residents.

3. The Title X regulations will impair, and possibly destroy, the ability of family planning clinics to render comprehensive, high quality medical care. The regulations will have a devastating impact on the reproductive health of thousands of low income women in New York City, as well as throughout the country.

4. The New York City Department of Health is not a direct Title X grantee, but it provides technical and consultative services to delegate agencies. It also provides education and information on reproductive health issues to the people of New York.

5. The Department sponsors the Pregnancy Healthline, a telephone service providing information and referrals on a wide range of reproductive health subjects. The Healthline staff counsel, refer, and make appointments for appropriate services. If unbiased information and counseling are no longer available through Title X clinics, due to these regulations, the Department's Healthline could become overloaded.

6. The regulations will harm the most vulnerable, high-risk people in the City: young low income women, including teenagers, substance abusers, and victims of Acquired Immune Deficiency Syndrome. Many of these women, for lack of appropriate information and counseling, will continue unwanted pregnancies, without seeking proper prenatal care. Children born under these circumstances are likely to have severe health problems

and even to die, contributing to the already unacceptably high infant mortality rate among the low income population of this City.

7. AIDS is the number one cause of death in New York City among women aged 25 to 34, the prime child bearing years when women most often use family planning clinics. Over 80 percent of the children who have been identified with AIDS in New York City were infected by their mothers. Three-quarters of the children with AIDS have died, most by the age of three.

8. Mothers of the overwhelming majority of children with AIDS in New York City are poor, minority women, members of a population which depends - usually solely - on Title X clinics for reproductive health care. Under the regulations, this population, which is at highest risk for AIDS transmission, would be the least equipped to cope with the possibility of exposure to the virus. Appropriate medical care requires providing a woman sufficient information about her conditions and alternatives so that she can reasonably decide her course of action. Every woman in New York City who is sexually active should consider her risk for HIV infection, and have access to responsible counseling about her risk of exposure and chances of transmitting AIDS to any children she conceives (almost 30 to 50 percent for an infected mother). For HIV infected women, the serious consideration of the option of abortion is vitally important. Yet such counseling would be impermissible under the regulations.

9. The regulations would seriously impair an established system of comprehensive family planning services in New York City at a time when it is faced with formidable challenges. Their implications for medical

providers, private and public health agencies and, ultimately, the reproductive health of low income women would be disastrous.

10. For the foregoing reasons, and based on my experience in the field of public health, it is my opinion that the Title X regulations will result in irreparable harm to many of the women who seek health care at Title X clinics.

WHEREFORE, I respectfully request that this Court grant plaintiffs' motion for a temporary restraining order and/or preliminary injunction.

Dated: New York, New York
February 5, 1988

/s/
STEPHEN C. JOSEPH, M.D.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK, ET AL., DR. IRVING RUST, ET AL.,	:	
Plaintiffs,	:	**AFFIDAVIT**
- against -	:	88 Civ. 0701/02
OTIS BOWEN, or his successor, Secretary of the Department of Health and Human Services,	:	(LLS)
Defendant.	:	

STATE OF NEW YORK)
)SS.:
COUNTY OF NEW YORK)

STEPHEN C. JOSEPH, M.D., being duly sworn, states:

1. I am the Commissioner of Health for the City of New York and a member of the Board of Directors of the New York City Health & Hospitals Corporation. I submit this affidavit in opposition to defendant's motion for summary judgment.

2. The occurrence of infant mortality and low birth weight are extremely high among low income women, who constitute the population served by Title X

clinics. For example, in the areas of New York City with lowest median family income, the infant mortality rate in 1986 was nearly double the rate in areas with highest median family income.

3. The major reason for both low birth weight and infant mortality is the lack of proper prenatal care. Failure to receive prenatal care is detrimental to the health of both mother and baby. Financial barriers and ignorance are the major reasons that low income women, fail to receive proper prenatal care. Because Title X clinics are an important source of information about pregnancy and prenatal care for the low income population, the new regulations will only exacerbate the infant mortality and low birth weight statistics in this population.

4. These two related problems are also extremely common among teenagers, who generally constitute 20-30% of the clients of Title X clinics. In 1986, teenagers in New York City gave birth to low birth weight babies at a rate of 11.7%, compared to the overall New York City rate of 9%, the mortality rate of babies born to teenagers in New York City in 1986 was 16.9 per 1000 live births, as opposed to 12.8 per 1000 in the overall population. These figures stem in part from the fact that teenagers are much less likely to get prenatal care than adult women. Of the women who gave birth in New York City in 1986, 32.9% of the teenagers had little or no prenatal care, whereas 19.3% of the non-teenage women giving birth lacked prenatal care.

5. Title X clinics are sources of both health care services and information. In fact, they are the sole source of non-emergency health care for many low income women. Even clinics which have no extensive

program of provision of prenatal care still provide patients with a great deal of information about prenatal care and pregnancy.

6. If the new regulations are enforced, the Title X clinic will be compelled either to abide by rules which conflict with its medical and ethical standards, or lose a substantial portion of its budget. Either alternative will result in a decline in prenatal care among the women who need it most.

7. If the clinic chooses not to continue federal funding, it will be forced by simple economics to accept and treat fewer patients. This decline in the number of patients a clinic sees can only lead to more unwanted pregnancies and fewer patients who receive prenatal information, referral and care -- which, in turn, will lead to increased instances of low birth weight and infant mortality.

8. If the clinic chooses to continue receiving federal moneys, its credibility with its patients, and therefore its usefulness, will decline. When patients learn the clinic can no longer give them honest, direct and complete answers to their questions about abortion, they will become reluctant to trust clinic personnel for any purpose, including prenatal care advice.

9. Under the new regulations, the Title X clinic can no longer explain to a patient that her medical condition (for example, AIDS) or some other factor (for example, exposure to rubella) may have seriously damaged her fetus. The clinic can only refer her to another provider, on the assumption and in the hope that the next provider will counsel her appropriately. In the meantime, the patient will remain ignorant of the

information she needs -- as soon as possible -- to determine whether she wants to risk delivering a severely damaged baby. By the time she gets this information, it may be too late for a first trimester, or for any, abortion.

10. An additional factor in the infant mortality area is the new requirement that Title X clinics completely separate their family planning activities from Title V activities. Title V provides funding for genetic testing and counseling. This program lowers the probability that babies will be born with genetic defects, and thereby also lowers the infant mortality rate. Title V programs include counseling about the possibility of aborting damaged fetuses, and such discussion cannot be conducted on the same premises with Title X activities. Most clinics will be financially unable to implement this kind of separation, and will therefore discontinue their participation in Title V programs, which are one of the only sources for genetic testing and counseling for the low income population. Thus this program, the purpose of which is to increase the likelihood that low income women will bear healthy babies, will be discontinued in many Title X clinics.

11. For the foregoing reasons, and based on my experience in the field of public health, it is my opinion that the Title X regulations will increase the incidence of low birth weight infants mortality among the low income population of New York City.

Dated: New York, New York
March 4, 1988

/s/
STEPHEN C. JOSEPH, M.D.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DR. IRVING RUST, ET AL.,	:	
Plaintiffs,	:	
- against -	:	DECLARATION OF JAY KATZ, M.D.
OTIS BOWEN, or his successor, Secretary of the United States Department of Health and Human Services,	:	Civ. No. 88-0702 (LLS)
Defendant.	:	

I, JAY KATZ, M.D., declare and state as follows:

1. I am a Board Certified Psychiatrist and have been on the faculty of Yale Law School for thirty years. I have published over forty articles and five books, including three books concerning informed consent, titled Experimentation With Human Beings, Catastrophic Diseases-Who Decides What?, and The Silent World of Doctor and Patient, and two other books titled The Family and the Law and Psychoanalysis, Psychiatry and the Law. Titles of articles I have written include the following: "Informed Consent: Are 'Miracle, Mystery and Authority' Better Medicine?"; "Can Principles Survive In Situations of Critical Care?"; "The Senate's Definition of Voluntary and Informed Consent: Another View"; "Disclosure and Consent - In Search of Their Roots"; and, "Informed Consent in the Therapeutic Relationship:

Medical and Legal Aspects." I am a Diplomate of the American Board of Psychiatry and Neurology and a Member or Fellow of numerous learned societies including the Institute of Medicine of the National Academy of Sciences, the American Psychiatric Association, American College of Psychiatry, and the American Psychoanalytic Association, where I am Chairman of the Committee on Psychoanalysis and Legal Issues and Legal Review. My Curriculum Vitae and Bibliography are attached hereto as Exhibit A.

2. Furthermore, I have testified as an expert witness on the effects on patient health of government interference in the doctor-patient relationship in Akron v. Akron Center for Reproductive Health, 479 F. Supp. 1172 (N.D. Ohio 1979), aff'd in part rev'd in part, 651 F.2d 1198 (6th Cir. 1981), aff'd in part rev'd in part, 462 U.S. 416 (1983) and in a case in Louisiana. In both cases, I was recognized as an expert witness on the question of bioethics, informed consent, and health effects of interfering in the doctor-patient relationship.

3. I have studied the new regulations promulgated by the United States Department of Health and Human Services ("HHS") under Title X of the Public Health Service Act ("Title X"). 53 Fed. Reg. 2922 et seq. (February 2, 1988).

4. I am making this declaration in support of plaintiffs' Motion for Summary Judgment and in opposition to defendants' Motion for Summary Judgment.

5. I am unequivocally opposed to the implementation of these regulations which radically depart from basic principles of informed consent, and

threaten to impair substantially the doctor-patient relationship.

6. By requiring a physician to steer a pregnant woman toward childbirth, to refuse to disclose information about alternatives and to terminate his relationship with a patient in need without counseling or assistance, these regulations do violence to the most basic principles governing the doctor-patient relationship. They compel a doctor to deceive his patient by keeping available options from her and by preventing her from seeking medical services which heretofore have been her right. It is this deception which I wish to highlight to the Court. When a physician conceals options from a patient he abandons her to irreversible life consequences which she might not have chosen. Abandonment is one of the most heinous violations of the law of malpractice and of medical ethics.

7. The doctor-patient relationship is based on trust. See P. Parsons, The Social System, (1951); it is recognized by law as a fiduciary relationship. Because patients must be able to rely on their physicians to act in good faith and in their best interest, principles of law and ethics require them to do so.

8. The physician thus has an obligation to be truthful, to respect the rights of the patient, and to disclose to the patient all pertinent facts regarding the patient's condition and treatment options including the risks and benefits of each. See Natanson v. Kline, 350 P.2d 1093, 1102-03 (Kan. 1960).

9. The Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association (AMA) (1986) specifically acknowledge that:

> The patient's right to self-decision can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. The patient should make his own determination on treatment. The physician's obligation is to present the medical facts accurately to the patient or to the individual responsible for [her] care and to make recommendations for management in accordance with good medical practice. The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice.

Opinion 8.07. Further, the standards of the American College of Obstetricians and Gynecologists state that "the physician should counsel the patient about her options of continuing the pregnancy to term and keeping the infant, continuing the pregnancy to term and offering the infant for legal adoption, or aborting the pregnancy."

10. While patients should not necessarily be able to insist upon any treatment they choose or that any physician provide it, their wishes ought to be heard and explored, not stifled by requirements on a physician to censor the full range of alternatives available to them. Thus, although a Title X physician may not actually provide abortion or long-term prenatal services, the physician remains obligated to provide the patient with sufficient information to permit a patient to obtain timely, appropriate services elsewhere.

11. In 1978, the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research (the "Commission") was

established by statute and charged with the task of examining the ethical and legal aspects of informed consent in the doctor-patient relationship. See 42 U.S.C. § 300v et seq. The Commission's report, Making Health Care Decisions: A Report on the Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship, (excerpt attached as Exhibit B), was released in 1982. It relies, in part, on my publications. The Commission concluded that "a physician is obliged to mention all alternative treatments, including those he or she does not provide or favor, so long as they are supported by respectable medical opinion." See Exhibit B at 76 (emphasis added).

12. Abortion was a recognized medical procedure long before 1970. In fact, when Title X was enacted, abortion was widely available under differing circumstances in different states. Thus, a physician at this time had an ethical duty to disclose the availability of the abortion option regardless of its legality in his home state.

13. Although in some respects legal standards have lagged behind those established by the medical profession, this has not uniformly been the case. In the past quarter of a century, American courts, supported by legal and ethical commentary, have articulated a requirement of "informed consent" which requires health care practitioners to disclose and discuss information pertinent to treatment choice with their patients. The first such case was decided in 1957, Salgo v. Leland Stanford, Jr., University Board of Trustees, 154 Cal. App. 2d 560, 317 P.2d 170 (1957). See Canterbury v. Spence, 464 F.2d 772, 780 n. 13, 781 nn. 19 & 22, 782 nn. 28, 30 & 31 (D.C. Cir. 1972) (and cases cited therein); Natanson v. Kline, 350 P.2d 1093 (Kan. 1960).

14. The doctrine of informed consent or physician-disclosure was full blown by 1970 when Congress enacted Title X. Indeed, one of the most well known cases on the subject was decided in the District of Columbia in 1972, Canterbury v. Spence, 464 F.2d 772 (D.C. Cir[.] 1972). Noting the "root premise" of American jurisprudence that "[e]very human being ... has a right to determine what shall be done with his own body," 464 F.2d at 780 (quoting Cardozo in Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92, 93 (1914)), the Court stated:

> True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each. The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision. From these almost axiomatic considerations springs the need, and in turn the requirement, of a reasonable divulgence by physician to patient to make such a decision possible.

464 F.2d at 780 (footnotes omitted) (emphasis added). This duty may further oblige the physician to advise the patient to consider one alternative over another depending on the medical circumstances. Id. at 781.

15. The scope of this duty should be measured by the patient's need for information and can not ethically be governed by a requirement of law inconsistent with the best interest of the patient.

16. This doctrine of informed consent has been codified in New York under the Public Health Law which provides:

> Lack of informed consent means the failure of the person providing the professional treatment or diagnosis to disclose to the patient each alternative thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation.

N.Y. Public Health Law § 2805-d(1) (McKinney) (emphasis added). Physicians "have a duty to provide a reasonable explanation of the avoidable alternatives and potential dangers of a medical procedure." Nisenholtz v. Mount Sinai Hospital, 126 Misc. 2d 658, ___, 483 N.Y.S.2d 570 (Sup. Ct. 1984).

17. These cases recognize what HHS now seeks to destroy: "the prerogative of the patient, not the physician [or, indeed, the federal government], to determine for [her]self the direction in which [her] interests seem to lie." See Canterbury v. Spence, 464 F.2d at 781.

18. At least since Roe v. Wade was decided in 1973, a woman's right to abortion has been constitutionally protected. Under these regulations, a physician is confronted with an impossible dilemma: he must either honor his ethical obligation to respect the rights of his patient as established by the United States Supreme Court and embraced by the AMA, or comply with the new Title X regulations in order to retain

funding which enables him to treat low-income women. Because a physician is ethically bound to choose the first of these options, the Title X program will be crippled by attrition as all self-respecting physicians opt out of the program. Low-income women will be worse off than if Title X had never been enacted.

19. The third Principle of Medical Ethics states: "A physician shall respect the law and also recognize a responsibility to seek changes in those requirements which are contrary to the best interest of the patient." For this reason, I submit this declaration in support of the relief sought by plaintiffs.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed this ____ day of March, 1988.

/s/
JAY KATZ, M.D.

[Exhibit A omitted.]

Exhibit B to Declaration of Jay Katz: President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions: A Report on the Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship* (1982)

* * * *

Treatment Alternatives and the Professional's Recommendation. In order for medical intervention to be warranted, the patient must stand to gain more from some intervention than if none were undertaken at all. As noted previously, the benefit to be gained must be assessed in terms of the patient's own values and goals. Thus, a practitioner should be cautious not to rule out prematurely an alternative that might offer what a particular patient would perceive as a benefit even if the practitioner sees it differently.

The patient's condition and the range of available alternatives will necessarily shape the course of the discussion. In some instances, there may be only one medically recognized treatment, so that the decision is primarily between that treatment and no treatment at all. In such cases, discussion will naturally focus on the benefits and risks associated with that treatment compared with the likely course of the untreated disease. Time is an important dimension here: can an intervention be put off, and with what consequences, to allow for greater diagnostic certainty and to permit the patient to reflect on the decision and to engage in any desired activities with which the intervention might interfere?

More commonly, there will be a range of medically acceptable responses to a given disease or health condition. The decision then has two components: <u>whether</u>

to treat and how to treat. Here the discussion will typically require a comparison of several treatment options and an airing of the preferences of both professional and patient.

Since the judgment about which choice will best serve well-being properly belongs to the patient, a physician is obliged to mention all alternative treatments, including those he or she does not provide or favor, so long as they are supported by respectable medical opinion. For example, an internist has an obligation to discuss a surgical option with a patient who might benefit from it. In any case[,] the physician would ideally offer to refer the patient to a physician who does offer or favor the alternative treatment.

Similarly, a physician ought not withhold information about a treatment from a patient simply because the physician judges its potential benefits not to be worth its costs.[15] Increasingly, however, even when physicians fulfill their obligation to describe alternatives, the expense of some alternatives may make them unavailable to most patients. Ordinarily, alternatives should still be described, even though they would not be covered by a patient's insurance plan (if any) or enrollment agreement with a health maintenance organization, lest the patient be deprived of the opportunity to seek other avenues for paying for the treatment or to look for treatment outside the insured or prepaid options.

Plainly, the special rules and expectations generated for the patient-professional relationship by the legal and ethical precepts summarized in the requirement of in-

[15] Nothing in the obligations that arise within the patient-professional relationship precludes physicians, individually or collectively, from taking steps to make the health care system more efficient, including the elimination of treatment options that do not produce a favorable cost-benefit ratio in particular cases.

formed consent find no precise equivalent in commercial relationships in the insurance marketplace. Nonetheless, because of the close connection between health insurance (including prepaid group plans) and health care, both the sellers and the buyers of such insurance should make sure buyers receive a comprehensible explanation of the limitations in what they are purchasing. Otherwise, their subsequent decisions at the time of selecting among treatment alternatives may not in any real sense be either voluntary or informed.

The Commission does not believe that each alternative must be discussed in comprehensive detail. Rather, the professional should initially set forth, in a fairly general way, the nature and implications of the various options. Such a discussion can and should be used to "sound out" what is important to the patient and to identify the options likely to prove most satisfactory in light of the patient's values and preferences. Once the options (including the possibility of no treatment) have been pared down to those that seem most promising to patient and professional, a more detailed evaluation of the risks and benefits is appropriate. Attention should be devoted as well to the time dimension and finality of the choice, and to the possibility of a sequential approach to various alternatives. In this process, the Commission views the discussion of risks and benefits as a step toward a sound decision among alternatives, not a supreme objective in itself.

This Report, like many discussions of informed consent, places considerable stress on the patient's right of self-determination, including the right to choose among available treatments or to reject a particular treatment. Yet the Commission does not mean to suggest that professionals must take a neutral position among available alternatives. Physicians ordinarily do make recommendations to patients, and many patients would be quite dis-

concerted if they were rebuffed when they requested a "doctor's opinion." Indeed, a critical aspect of the professional's role is to provide expert advice and judgment, and not solely technical diagnostic or curative skills. But the recommendation should neither be, nor appear to be, coercive; rather, it should function both as a yardstick against which patients can measure their own inclinations and as a stimulus to further questioning and discussion if the recommendation is not one the patient agrees with.[16]

* * * *

[16] In making treatment recommendations the health care professional may indicate what his or her own values are. To the extent that a particular recommendation is based on the professional's values, rather than the patient's values, that should be made clear. For example, a physician may recommend that an athlete retire from competition because it is harming his or her health. The athlete, however, may want to remain in professional competition as long as possible. The physician may reply that the patient's view is shortsighted and that health is more important than another year of professional sports. Once having stated the recommendation, however, and having made clear the values that led the physician to the recommendation, the choice remains the patient's. When there are a number of medically appropriate treatment alternatives, the decision among them may also turn on value preferences. For example, a physician who feels strongly that kidney transplant is preferable to renal dialysis is likely to be stating a value preference rather than a purely medical conclusion. In such situations, physicians should recommend that the patient consult with another expert with opposite views before making a final decision. In both examples, clarification of the professional's values is likely to provoke a useful discussion of the patient's values. *See, e.g.*, Robert M. Veatch. *Generalization of Expertise*. 1 THE HASTINGS CENTER STUDIES 29 (1973).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DR. IRVING RUST, ET AL.,	:	
Plaintiffs,	:	
- against -	:	**DECLARATION**
		88 CIV. NO. 0702
OTIS BOWEN, or his successor, Secretary of the United States Department of Health and Human Services,	:	(LLS)
Defendant.	:	

TONI MORGAN, being duly sworn, deposes and says:

1. I am Director of Social Services for the Bronx clinic (colloquially called the "HUB") of Planned Parenthood of New York City. I have been at the HUB since February, 1987. Previously, from 1981 to 1986, I was employed as a social worker in the adolescent health center of Mt. Sinai Medical Center where I counseled teens regarding sexuality, pregnancy, abortion and other matters which frequently concern them. In 1983, I began training social work students to counsel adolescents in these areas. I was certified as a social worker by the state of New York in 1980. See Resume attached hereto as Exhibit A.

2. I submit this affidavit in support of plaintiffs'

Motion for a Preliminary Injunction enjoining implementation of the proposed regulations promulgated by the United States Department of Health and Human Services (HHS) under Title X of the Public Health Service Act ("Title X"). I make this affidavit in my capacity as an expert in teen counseling employed by a subgrantee of Title X funds.

3. I have studied the new regulations. Based upon my experience with the HUB's family planning activities and my professional training, it is my opinion that the proposed regulations will cause irreparable harm to the HUB and to those individuals who seek counseling at the HUB, particularly sexually active adolescents.

4. Consistent with Title X and current HHS regulations and program guidelines, the HUB provides counseling and referral for family planning patients about contraception, prenatal care, abortion and other related issues. Ideally, social workers at the HUB would counsel every adolescent patient who requests a pregnancy test, regardless of the test result. This is because sexual activity can be an indication of rebellion, unmet needs, or of trouble as much as of normal maturation. However, due to patient volume, HUB social workers limit their counseling to early adolescents, patients requiring crisis intervention, and to those family planning patients referred to them by health care staff. In other instances, patients are counseled by "client assistants."

5. Many of the pregnant adolescent patients receiving counseling services at the HUB have not yet decided whether to abort or continue their pregnancy. No responsible family planning clinic can operate without counseling such adolescents as to all of their

available options, including that of abortion. See Counseling: A Manual for the Staff of Planned Parenthood of New York City, Inc. at 11, 23-4 (1983). Moreover, an adolescent's unwanted pregnancy can raise many unresolved issues. Thus, even after an abortion or a full-term pregnancy it is imperative that patients be referred back to a counseling program, preferably to the same counselor. Follow up of this sort is an important part of an effective medical program in the area of reproductive health as well.

6. Adolescents frequently rely on clinic staff as the only available source of family planning information. They need comprehensive counseling in a value-free context in order to arrive at an informed choice which is right for them.

7. For teens, reproductive choices such as whether and with whom to become sexually active, whether to use contraception, which method to use, and what to do in the event of an unintended pregnancy are all made in the social, psychological and developmental context of adolescence. These choices are highly inter-related. Thus, a minor's concerns or desires regarding pregnancy or childbirth may affect her choice whether to become sexually active and whether to contracept. Her feelings about her sexual partner and whether she had been using birth control may affect her feelings about pregnancy and the options of childbirth and abortion. Life [am]bitions, parental and family relationships, personal history and the availability of financial and emotional resources must all be considered.

8. Timely, non-directive counseling which addresses the whole adolescent is a necessary part of any family planning program. In fact, when an adolescent is

in need of counseling and this need is not met promptly, the consequences may be as serious as repeated pregnancies, running away from home, failure in school or even suicide. Referral alone will often result in severe harm to the adolescent who, having timidly and tentatively reached out for help in a crisis, must be rejected and told to go elsewhere. Faced with such a referral, many of my clients would never obtain help; others would act out in destructive and frequently irrevocable ways.

9. All individuals must have continuity in their relationship with social workers or counselors in order to establish the trust and confidence that is a necessary prerequisite to effective counseling. The proposed regulations require that once a client is diagnosed as pregnant she must terminate even an ongoing counseling relationship with a Title-X funded social worker at a Title X program. An adolescent, in partic[u]lar, will feel betrayed and uncared for and her relationship with her counselor will suffer irreparable damage. She may react by refusing help offered by other adults. It may permanently harm her ability to accept and trust <u>any</u> subsequent counseling relationship.

10. For example, one seventeen-year old girl was referred to a HUB social worker regarding her feelings of depression. Over the course of a continuous counseling relationship, she revealed her early childhood experiences of sexual molestation by her older stepbrothers; her conflicted relationship with an older man, and her concern that she might be pregnant. When her suspected pregnancy was subsequently confirmed, the adolescent's trust in the therapeutic relationship enabled the counselor to involve members of the girl's family, who were previously unaware of both the molestation

and the pregnancy, in the resolution of these problems. Such comprehensive counseling increased the adolescent's previously low self-esteem and gave her the necessary confidence to deal with the pregnancy in a way best suited to her needs and to improve her intimate relationships with her family and with others.

11. Another girl, fifteen years old and with a history of sexually transmitted disease (STD) was referred to a HUB social worker for counseling. As her confidence in the counseling relationship progressed, the adolescent was able to reveal her experiences of abuse and neglect by her mother. She was also able to discuss her pregnancy and the resulting fear which had led her to run away from home in an attempt to avoid her mother's physical reprisals. Working with her counselor, the adolescent was able to resolve her pregnancy crisis and to make family planning decisions to prevent future sexually-related medical difficulties and to avoid future pregnancies. Moreover, her HUB social worker discovered the mother's drug dependency and was able to substantiate the mother's abusive behavior. Pursuant to a neglect proceeding, the mother's ability to care effectively for her adolescent daughter with the assistance of supportive treatment is currently under evaluation.

12. In both of these cases, termination of the counseling relationship at the point of pregnancy diagnosis would have prevented any resolution of the issues raised in treatment. It would also have endangered the physical and emotional health of the patient involved. The abrupt disruption of a trusted counseling relationship is <u>never</u> inconsequential.

13. It is my professional opinion, that the new Title

X regulations will result in irreparable harm to the physical and mental health of the indigent women and adolescents who are my patients and to the provision of responsible family planning services in Title X-funded facilities, such as the HUB.

WHEREFORE, I respectfully request that the Court grant plaintiff's Motion for a Preliminary Injunction.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on:
12/22/87 /s/
Antonia Cordero Morgan, M.S.W.

[Exhibit omitted.]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DR. IRVING RUST, ET AL.,	:	
Plaintiffs,	:	
- against -	:	**DECLARATION**
		88 CIV. NO. 0702
OTIS BOWEN, or his successor, Secretary of the United States Department of Health and Human Services,	:	(LLS)
Defendant.	:	

GEORGE W. MORLEY, M.D. deposes and says the following:

1. I am President of the American College of Obstetricians and Gynecologists ("ACOG"). I have been an active member of ACOG for 30 years and have held leadership positions in the organization at the state, district and national levels. I have served as the President of ACOG since April of 1987.

2. I am a licensed physician with residency training in obstetrics and gynecology. For the past 31 years, I have worked in the field of academic medicine at the University of Michigan Medical Center, and was recently appointed the first Norman F. Miller Professor of Gynecology at that institution. From 1974 to 1986 I held the position of Director of the Gynecologic Onco-

logy Division of the Obstetrics and Gynecology Department at the University of Michigan Medical Center. I have served as a consultant in obstetrics and gynecology at Westland Medical Center from 1961 to 1986 and at the United States Veterans Administration Hospital in Ann Arbor, Michigan from 1957 to the present.

3. Over the course of my career, I have served as President of the Michigan Society of Obstetricians and Gynecologists, the Society of Pelvic Surgeons, the Society of Gynecologic Oncologists, and the Society of Gynecologic Surgeons. I have published more than 50 articles in the areas of obstetrics[,] gynecology, and oncology. A copy of my resume is attached as Exhibit A.

4. I submit this declaration in support of plaintiffs' Motion for a Preliminary Injunction enjoining implementation ofnew regulations promulgated by the United States Department of Health and Human Services ("DHHS") under Title X of the Public Health Service Act ("Title X"). I submit this declaration in my capacity as the President of ACOG, a national medical organization of more than 27,000 physicians specializing in the delivery of health care to women.

5. I have studied the new regulations. In my professional opinion and in the opinion of ACOG, I believe that the regulations will cause irreparable harm to women, particularly to poor women and adolescents, as well as to the integrity of the services provided by physicians at Title X-funded clinics.

6. Every year, some 3,900 Title X clinics provide family planning services to nearly 4.5 million patients, many of whom are low income women or adolescents with high risk pregnancies and few of the financial or

personal resources necessary to obtain private medical care. By prohibiting these clinics from offering counseling and referral for abortion as well as from providing any services to women diagnosed as pregnant, the regulations will (1) cause many pregnant patients to delay obtaining prenatal care or abortion-related services; (2) subject many of these women to unwanted motherhood by default or to unnecessarily high risk pregnancies and births due to the absence of prenatal care; (3) inhibit health care professionals from exercising their professional judgment by subjecting them to the risk of ethical disciplinary procedures or malpractice liability; and (4) reduce the availability of family planning and reproductive health services nationwide.

7. ACOG is concerned that the regulations present family planning providers with an untenable dilemma: they must either accept Title X funds and comply with conditions which conflict with sound medical practice or refuse these funds and be unable to afford to continue providing reproductive health services to those who cannot pay or, indeed, provide these services at all.

8. In those clinics which retain Title X funds, the regulations perpetuate a dual standard of medical care: one for patients served in federally-funded Title X clinics and another for patients who can afford private care. Patients at Title X clinics will receive only government-sanctioned family planning information, and may have no knowledge that complete and unbiased information is available to those women with the ability to pay. Because poor women and adolescents will be forced to accept the incomplete and potentially inaccurate information available from Title X providers, they will be unable to make truly informed family planning decisions.

9. As a professional association committed to maintaining high standards of health care for all women, ACOG opposes conditions on federal grants to providers which require them to undermine these standards. ACOG believes that federal subsidies for reproductive health care should manifest respect for professional judgment, increase the availability of high quality care and attempt to equalize access to such care for those without alternative resources. Contrary to such aims, these regulations will undo the achievements of the Title X program and will harm women in the following ways.

10. If a patient decides to carry her pregnancy to term, compliance with the regulations will endanger her own health and that of her infant. For many poor women and adolescents, the Title X health care provider will be the only professional consulted during the early months of pregnancy. By limiting counseling once pregnancy is diagnosed, the new regulations will exacerbate existing delays in obtaining prenatal care which is common among the patient population served by Title X clinics. According to a recent Government Accounting Office report, 63% of Medicaid recipients and uninsured women fail to obtain sufficient prenatal care. In addition, data from the National Center for Health Statistics shows that less than half of pregnant 15 to 17 year-olds receive care in the first trimester of pregnancy.

11. This failure to obtain early and adequate prenatal care stems from a variety of factors such as cost, unavailability, lack of resources or information, or a failure to understand the importance of such care. The proposed regulations will make these obstacles to proper prenatal care worse. Failure to obtain early and adequate prenatal care is a major factor contributing to

the high infant mortality rates among low income women and adolescents who carry to term.

12. The prohibition on counseling and referral for abortion may similarly delay women in obtaining abortion services until later and more hazardous stages of pregnancy. Abortions performed later in pregnancy carry increased morbidity and mortality risks. Although only a small percentage of abortions are performed during the second trimester of pregnancy, these abortions caused approximately half of all abortion-related deaths between 1972 and 1981. Moreover, the mortality risk for abortion increases 50 percent with each week after the eighth week of pregnancy while the risk of major complications (morbidity) increases about 30 percent per week. Delay in obtaining abortion services is thus particularly harmful for pregnant adolescents, who already tend to seek medical services belatedly.

13. The requirement that pregnant patients be referred only to prenatal or delivery services will further delay women seeking abortions. Some of these women may be unable to locate a licensed provider in a timely fashion. In addition, the requirement that every pregnant patient be given information on prenatal care creates a federally subsidized affirmative pressure to carry to term. By mandating delay in abortion services and by limiting counseling, referral and information, and by steering women toward the option of childbirth, the new regulations will lead some women to carry to term against their will thereby increasing the incidence of unwanted motherhood.

14. The prohibition on counseling regarding abortion undermines the very informed consent process for which physicians are responsible. Patients will be

deprived of information necessary to make family planning and other health care choices.

15. Pregnant patients will have to decide whether to carry a pregnancy to term without crucial information about the abortion option and the existence of licensed abortion providers. Inappropriate and misleading referrals to prenatal or delivery services together with a lack of counseling and information will act to steer pregnant women toward only one of their available options, thus further undermining informed, voluntary reproductive choice.

16. The regulations will expose adolescent patients at Title X clinics to additional harms specific to teenagers. Although ACOG urges adolescents to postpone sexual activity, every year 2.4 million women in the United States under the age of 18 are at risk for pregnancy because they are in fact sexually active. Pregnant adolescents run considerably higher risks of maternal mortality, maternal morbidity and low infant birth weight. Comprehensive and effective family planning and prenatal services can greatly reduce such risks. By seriously disrupting the continuity of Title X-funded health care for such an at-risk population, the regulations threaten the lives and health of innumerable adolescents and their infants. Teenage pregnancy and childbirth are associated not only with medical difficulties, but also with severe social and economic problems. For example, in 1986 the United States spent 18 billion dollars in public assistance payments to households in which the mother was a teenager when her first child was born.

17. Further, the regulations will endanger the lives and health of those women with medical conditions

which may be exacerbated through continued pregnancy. Health care providers will not be able to discuss medical indications for abortion with a pregnant patient diagnosed for any number of conditions such as cardiac and renal conditions and Acquired Immunodeficiency Syndrome ("AIDS"), despite the fact that pregnancy may increase the risks both of progression of the infection and of development of AIDS or AIDS-related complex. Similarly, a woman who has an estrogen-dependent tumor which will spread more rapidly due to hormonal changes associated with pregnancy will not receive the counseling and referral for abortion which are essential to her health. Only a referral to prenatal or medical services is permitted.

18. The regulations also will irreparably harm Title X-funded health professionals by causing them to violate the standards of conduct and ethics promulgated by ACOG and other professional organizations. Restrictions on the content of physician-patient counseling are contrary to the ethical practice of medicine and violate a basic medical principle: the duty of the health care provider to supply all pertinent information to the patient.

19. The Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association-1986 (Exhibit B) [see pp. 79-81 of this joint appendix] dictate that: "[t]he patient's right of self-decision can be effectively exercised only if the patient possesses enough information to enable an intelligent choice." ACOG has elaborated on this principle of informed consent in the area of pregnancy. Specifically, ACOG Standards for Obstetric-Gynecologic Services (1985) (Exhibit C) [see pp. 77-78 of this joint appendix] state:

> In the event of an unwanted pregnancy, the physician should counsel the patient about her options of continuing the pregnancy to term and keeping the infant, continuing the pregnancy to term and offering the infant for legal adoption, or aborting the pregnancy

and ACOG Statement of Policy (Dec. 1977) (Exhibit D) [see p. 76 of this joint appendix] states:

> Counseling directed solely toward either promoting or preventing abortion does not sufficiently reflect the full nature of the problem or the range of options to which the patient is entitled. Appropriately balanced counseling, combined with the available and accessible facilities, provides the minimum base for the opportunity to make a truly informed choice. (Emphasis added)

20. The practice of good medical care demands open communication between health care professionals and their patients. If physicians are prevented from engaging in uninhibited, active interchange with the patients they serve consistent with professional judgment under the circumstances, patients cannot receive optimum care.

21. Restrictions on a physician's ability to provide information to patients also raises the spectre of medical malpractice. Physicians may be liable for failure to fully inform patients of all alternative options, failure to provide adequate information regarding health risks, and failure to provide appropriate follow-up services. A physician has the professional responsibility to counsel a pregnant patient with a genetic disease such as Tay-Sachs

that abortion exists as a medical option. By prohibiting health care providers from following standard medical protocol in such situations, the regulations will expose health care providers to the irreparable harm of legal liability and professional discipline.

22. The chilling effect of threatened professional censure, loss of license or legal liability for malpractice will deter providers from participating in Title X family planning programs. The resulting restriction in the availability of quality services will cause irreparable harm to patients who cannot afford private medical care.

23. Finally, ACOG is concerned that the regulations will impose heavy financial burdens on Title X health care providers and will decrease the quality of patient care. Many hospitals and ciinics maintain a single, integrated set of records. Because optimal patient care requires that health care providers have access to all information about a patient, it is imperative that this system remain undisturbed.

24. For the foregoing reasons, and based upon my experience in the field of Obstetrics and Gynecology, it is my opinion that the proposed Title X regulations will result in irreparable harm to patients, particularly to the indigent women and teens Title X was designed to serve, and will undermine the integrity and the quality of Title X-funded services.

WHEREFORE, I respectfully request that the Court grant plaintiff's Motion for a Preliminary Injunction.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 2/1/88

/s/
George W. Morley, M.D.

[Exhibit A omitted.]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, ET AL.,	
Plaintiffs,	AFFIDAVIT OF KATHLEEN MURRAY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
- against -	
OTIS BOWEN, Secretary of the United States Department of Health and Human Services,	
Defendants.	

STATE OF NEW YORK)
: SS.:
COUNTY OF ERIE)

KATHLEEN MURRAY, being duly sworn, deposes and says:

1. I am the Assistant Vice President for Ambulatory Care of the Buffalo General Hospital (the "Hospital"), a comprehensive health care system in Buffalo, New York which includes the Deaconess Hospital of Buffalo ("Deaconess") and which is a primary affiliate of the Faculty of Health Sciences of the State University of New York at Buffalo. As Assistant Vice President for Ambulatory Care, I oversee the Deaconess Family Planning Program ("DFPP"). I submit this

affidavit in support of plaintiffs' motion for a preliminary injunction to enjoin the implementation of the newly promulgated Title X regulations.

A. The Deaconess Family Planning Program

1. Organization, Funding and Clientele

2. DFPP operates three family planning clinics, none of which are located at the Hospital itself. Our Riley Street Clinic is located approximately ten blocks away from the Hospital; the High Street Clinic is located behind the Hospital and the Akron Clinic is located in Akron, New York, a small rural community approximately twenty-five miles outside of Buffalo.

3. The Riley Street Clinic operates on a full time basis, serving approximately 140 persons each week. The High Street and Akron Clinics each operate on a part time basis and each serve approximately 25 to 30 individuals weekly.

4. DFPP's anticipated income for Fiscal Year 1987-88 is approximately $700,000. Our Title X funding will total $237,836, or 34% of our total budget. Other sources of funding include medicaid reimbursement, the New York State Department of Health, private funds and patient fees. DFPP's budget is separate from that of other Hospital clinics and departments.

5. At the present time, DFPP employ[s] the equivalent of almost eighteen full time workers, including physicians, counselors, nurse practitioners, and educators. DFPP staff do not rotate through the Hospital's other staff, but are paid through the Hospital's payroll Department.

6. The majority of DFPP patients are poor black women, almost half of whom are under the age of 20. In 1986, DFPP served 4,283 unduplicated users, of whom approximately 87% had incomes below 150% of the poverty level. Approximately 49% of these women are between the ages of 10 and 19, and the vast majority of them are between the ages of 18 and 22. Of the patients served between January 1 and September 30 of this year, almost 79% had incomes less than 100% of the poverty level. DFPP is often the first and only entry to nonemergency health care for this population. It is the major provider of reproductive health care for the black community in Buffalo.

7. An increasing number of our patients are among the working poor who are ineligible for medicaid and yet without other adequate health insurance. These women depend on our sliding fee scale made possible by Title X.

2. Services Provided by DFPP

8. DFPP provides a range of family planning and health screening services, including discussion and provision of all methods of birth control, both prescription and non- prescription; gynecological examinations; diagnosis and treatment of venereal diseases; pregnancy testing with counseling and referrals; breast examinations and screening for anemia and sickle cell anemia. DFPP does not perform abortions.

9. DFPP conducts a wide variety of educational programs in our service area including programs on reproductive health care and birth control. And because so many of our patients are low income teenagers, DFPP runs a number of special programs aimed at teens, such

as programs on self-esteem and on saying "no". Our education programs are funded in part by Title X and are presented through community organizations and service agencies, churches and local clubs.

10. Our special education and teen programs have been extremely successful when judged by DFPP's growth rate of 10% to 27% per year over the last six years. Our retention has improved from 65% in 1981 to 89% in 1986. This growth means a reduction in unplanned, unwanted pregnancies in the area we serve.

11. DFPP's professional staff attempts to develop personal relationships with all of our patients and to see them on a regular basis. Indeed, the great majority of our patients are seen every six months for a check up. If a patient fails to make an appointment for a six month check-up, we send her a series of reminder letters. Moreover, DFPP maintains a close relationship with other clinics maintained by the Hospital, such as the obstetrics/gynecology clinic ("ob/gyn clinic"). Thus, if patients leave our care for that of the ob/gyn clinic, they will be referred back to us.

12. If a DFPP patient is pregnant, our physician or nurse will inform her, tell her the expected due date and will ask her how she would like to proceed. If she wants to carry her pregnancy to term, our staff will refer her to the community health centers or to local hospitals. If she is interested in the Hospital's ob/gyn clinic, she will be given their telephone number and our staff may even make an appointment for her.

13. If a pregnant patient requests information about abortions and abortion providers, our physician or nurse will provide her with a referral sheet listing various

abortion providers. Each of the providers listed on our referral sheet provides counseling. Our staff will discuss with her the questions she should ask the abortion providers that she calls, such as the cost and method of payment and the ability to obtain an early appointment. Our staff will also inform the patient that other abortion providers are listed in the telephone book if she wants to explore other resources.

14. If a DFPP patient suffers from a medical condition that may be aggravated by the continuation of a pregnancy, that patient is so advised. Such information permits the patient to make an informed decision regarding her pregnancy without unduly delaying in making that decision.

B. Impact of the New Regulations

15. As previously stated, DFPP serves predominantly young, low income, minority women who have no other source of subsidized reproductive health care. The new regulations will severely jeopardize our ability to provide these women with quality, compassionate reproductive health care. They target women who are already the victims of poverty and who traditionally have poor access to the health care system. This will result in a second class health care system for women who are already too often treated as second class citizens.

16. The new regulations require us to advocate childbearing to our clients, irrespective of their health, or emotional state. They prevent our staff from making referrals for all options.

17. By prohibiting us from counseling a woman

about abortion even if she is at medical risk as discussed in paragraph 14, supra, the regulations, if followed, will force us to expose our patients to serious health dangers. Moreover, they subject DFPP to potential liability from failing to obtain informed consent from the patient and from failing to conform to accepted standards of health care.

18. DFPP's physicians are extremely concerned by defendants' attempts to regulate their private patient/doctor relationship and to force them to commit what they consider to be malpractice. DFPP may therefore be forced to withdraw from the Title X program altogether. Our withdrawal from the Title X program can only hurt the patients we serve as it would mean that we would no longer be able to offer those low income women who are ineligible for medicaid the sliding fee scale we offer currently with the use of Title X funds.

19. DFPP's regulation depends upon establishing a relationship of trust with our high risk population. This relationship can only be established if we are perceived as providing quality, comprehensive care to our patients. Once the nature and scope of the information we provide is restricted, the trust our patients have in our ability to provide quality services is undermined. Indeed, adherence to the regulations will most likely make our patients angry and will greatly diminish our relations [with] the community. Fewer women will rely on our services and more unplanned, unwanted pregnancies will result.

Conclusion

For the foregoing reasons, I respectfully submit that plaintiff's motion be granted.

/s/
KATHLEEN MURRAY

Sworn to before me this
16th day of Dec., 1987

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE STATE OF NEW YORK, ET AL.,

Plaintiffs,

- against -

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Defendant.

AFFIDAVIT

LINDA RANDOLPH, M.D. M.P.H., being duly sworn, deposes and says:

1. I am the Director of the Office of Public Health of the New York State Department of Health ("NYSDOH") which includes the Bureau of Reproductive Health. Besides an M.D., I have a Masters in Public Health degree in Maternal and Child Health. I submit this affidavit in support of plaintiffs-appellants' motion for an injunction against enforcement of the regulations at issue, 42 CFR 59.8 through 59.10, pending review by the United States Supreme Court.

2. On September 29, 1989 NYSDOH received a Notice of Grant Award from the Department of Health and Human Services ("DHHS") in the amount of $5,817,471 for the budget period July 1, 1989 through

June 30, 1990. The Notice specifically states that the grant is made subject to the grantee providing assurances to DHHS of its intent to provide services in compliance with the regulations within twenty days after a ruling upholding the regulations by the United States Court of Appeals for the Second Circuit. I understand that the time within which NYSDOH has to notify DHHS of its compliance or noncompliance with the requirements of 42 CFR 59.8 through 59.10 has since been extended to December 1.

3. Complying with the regulations would run counter to NYSDOH's standards of acceptable medical practice by effectively denying low- and moderate-income women information they need to make informed decisions about their reproductive health care. Carrying out the requirements of 42 CFR 59.8-59.10 would violate New York State's policy that medical service "of the highest quality, efficiently provided and properly utilized at a reasonable cost, are of vital concern to the public health." See N.Y.S. Public Health Law § 2800. Implementation of the regulations at issue would force medical professionals to violate state codes of professional conduct; see N.Y.S. Education Law §§ 6506-6509, 8 NYCRR 29.2; and render them liable for malpractice for failing to give full informed consent. See N.Y.S. Public Health Law § 2805-d(1).

4. The NYSDOH Title X Project grant currently funds 37 delegate agencies throughout New York State. Of those 37 agencies, 27 are protected under injunctions issued in Massachusetts v. Bowen or Planned Parenthood Federation of America v. Bowen, either because they are members of the National Family Planning and Reproductive Health Association ("NFPRHA") or because they are Planned Parenthood affiliates. Those 27 agencies will

continue to receive funding under the Grant Award issued on September 29, 1989 until such time as one or both of those injunctions are lifted.

5. The remaining ten delegate agencies receiving Title X funds through NYSDOH, however, face the imminent loss of their funding if this Court does not grant an injunction pending review by the United States Supreme Court and they determine they are not able to comply with the regulations. The ten affected projects are: Greene County Family Planning Service, Harlem Hospital, Livingston County Health Department, Middletown Community Health Care Center, Nassau County Health Department, Suffolk County Health Department, Threshold Center for Alternative Youth Services, Westchester County Health Department, Family Life Information Center and Westchester/Rockland Planned Parenthood. The affected projects, their Title X funding allocations, other budgetary details, and the numbers of clients served are listed below:

	Total Budget	Total NYS Grant	Total Title X Grant	Number of Sites	Number of Clients
Greene	$ 191,823	$ 86,798	$ 36,310	1	1,002
Harlem	996,857	378,195	245,840	1	6,776
Livingston	417,844	191,222	28,338	2	1,878
Middletown	233,123	124,187	21,655	2	2,045
Nassau	1,002,164	395,771	126,303	4	5,111
Suffolk	1,983,660	724,051	244,224	12	5,653
Threshold	599,504	186,608	126,140	1	2,382
Westchester HD	588,876	263,909	149,661	4	2,111
FLIC	88,862	60,900	15,870	1	123
West/Rock PP	2,434,969	693,203	204,233	9	11,360
TOTAL	$8,537,702 (100.0)	$3,105,474 (36.4)	$1,238,584 (14.5)	37	41,408

6. Title X funds represent a significant resource to the New York State Family Planning program; the $5,817,471 awarded for 1989-90 represents 24.8 percent of the total program funding of $23,489,837. Title X funds are particularly important to the projects listed above. Title X funds represent just under 40 percent of the total New York State Family Planning Program grant fund provided to those agencies and they account for 14.5 percent of the projects' total operating budgets.

7. In 1988, these ten projects provided comprehensive high quality family planning services to a total of 41,408 clients; 32,095 or 77.5 percent of which had incomes below 200 percent of the federal poverty level, 14,031 or 33.9 percent of whom were racial minorities, and 11,328 or 27.4 percent of whom were teenagers. Loss of Title X funding will have a major impact on these populations. All affected projects service areas with economically disadvantaged populations at risk for adverse pregnancy outcomes. New York State has made considerable effort to ensure that such areas are targeted for family planning programs, and loss of Title X funds will mean service loss at least in proportion to the amount of Title X funds lost. Discussion of the anticipated impact of Title X funding losses on selected projects and their service area population follows:

Harlem Hospital Family Planning Program

8. This institution serves the Central Harlem area of Manhattan, without question the highest risk area of New York State for adverse outcomes of pregnancy. In 1986, eight out of every ten babies born to Central Harlem residents were born out-of-wedlock, and the incidence rates of low birth weight (19.0%) and infant

mortality (27.6/1000 live births) were twice and three times that of New York City as a whole, respectively.

9. In 1988, the project provided care to 6,776 clients who made 11,097 visits. Nearly all clients (97.6%) had family incomes below 150% of the Federal Poverty level, and 5194, or 76.7% were black women. Teens comprised 1468, or 21.7 percent, of total clients.

10. Title X funds awarded for the 1989-90 program year amount to $245,840, or 24.7 percent of the project's total budget. A loss of this magnitude will force major reductions in clinic hours and staffing, and concomitant reductions in the service capacity of the project. Without Title X funding, it is estimated that 1200 fewer clients will be served over the next year. There are no alternate public providers of family planning services for the residents of Central Harlem, and loss of Title X funding could threaten the viability of the entire project.

Westchester County Department of Health/Westchester Rockland Planned Parenthood

11. These two projects serve residents of two major counties in the New York City metropolitan area. The areas served by these projects are among the highest risk areas of New York State, as demonstrated by the accompanying maps. In 1988, these agencies served 13,471 clients, most of whom were women residing in the high risk communities - Yonkers, Mt. Vernon, New Rochelle, White Plains, Portchester, Peekskill and Ossining in Westchester County; and West Nyack, Nyack and Haverstraw in Rockland County.

12. Loss of Title X funding, which totals $353,894 for the 1989-1990 program year, will mean that some

2,020 fewer women at risk for unintended pregnancy will be served in the coming year. This loss is especially critical since there are no publicly-subsidized family planning services in the majority of areas served by affected project sites. In Westchester County, only Peekskill and Ossining have suitable alternative resources, while in Rockland there are no alternatives available. Even in Peekskill and Ossining, however, it will take months to develop the capacity to meet increased service volume needs.

Nassau County Health Department/Suffolk County Health Department

13. These agencies provide care to residents of the two most populous counties, outside of New York City, in the State. Although both are prosperous counties, they provide services to significant pockets of population characterized by economic deprivation and poor health status. The family planning project sites operated by these agencies provided care to 10,764 clients in 1988. With an anticipated loss of $370,000, or 12.4 percent of their total project budgets, it is estimated that 1335 fewer clients will be served in the coming year.

14. Although both counties are served by Planned Parenthood organizations, only 3 of 12 areas served by Suffolk County Health Department are also served by Planned Parenthood sites, and none of four Nassau County Health Department clinic sites have Planned Pare[n]thood sites in reasonable proximity. In any event, neither of the Planned Parenthood agencies has the capacity to absorb a large number of new clients, and it would require at least six months to develop the staffing and clinic space needed to accommodate them.

Threshold

15. This project is unique in that it provides comprehensive health, social support and education services to a young, largely teenaged population. Family planning services are offered as one element in a comprehensive service environment. The agency's Title X award was $126,140 for the 1989-1990 program year, an amount that represents 21.0 percent of its total budget.

16. In 1988, this agency provided family planning care to 2382 young people, of whom 1362, or 57.2 percent, were teenagers and 841, or 40.0 percent, were members of racial minority groups. Loss of Title X funding will mean staffing and service reductions such that 420 fewer clients will be served in the coming year.

17. Because this agency cannot obtain third-party reimbursement for many of the services it provides, it is highly reliant on categorical grant funds for survival. In its current vulnerable financial condition, a funding cut[] of this magnitude could threaten its viability. It is conceivable, then, that total service loss could occur.

18. Downtown Rochester is served by Planned Parenthood of Rochester. Although some teens now served by Threshold might access Planned Parenthood services, most will probably not. Most Threshold clients come not for family planning services, but for a variety of social service-related reasons. During the course of counseling, the teens will acknowledge their needs for family planning services and it is then that care is provided. Important school outreach and counseling programs supported by the grant will be discontinued, thus further undermining the case finding and community

education function of the agency.

Conclusion

19. In summary, the loss of Title X funds for any of the affected agencies who determine that they cannot comply will have a major effect on the ability of NYSDOH to meet its mission of enabling high risk low-income women to obtain high quality comprehensive family planning services. If all of the affected agencies decide they cannot comply, an estimated 6200 women will be unable to obtain services in the next year if loss of funding occurs; if only half experience an unintended pregnancy, and their outcomes approximate those of New York City residents age 20-24, a total of 843 additional out-of-wedlock births and 1498 additional abortions will occur among New York State residents. The cost of such events, whether appraised in human or economic terms, will surely surpass whatever benefits might accrue to the federal government in implementing the regulations immediately. Even if the affected agencies comply with the requirements, their clients will suffer because they will be unable to make decisions and obtain medical services with full knowledge of available alternatives.

For the reasons set forth above, I respectfully submit that this Court enjoin enforcement of the regulations in New York State, pending review by the United States Supreme Court.

/s/
LINDA RANDOLPH, M.D., M.P.H.

Sworn to before me this
13th day of November, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DR. IRVING RUST, ET AL.,	:	
Plaintiffs,	:	
- against -	:	DECLARATION 88 CIV. NO. 0702
OTIS BOWEN, or his successor, Secretary of the United States Department of Health and Human Services,	:	(LLS)
Defendant.	:	

IRVING RUST, M.D. deposes and says the following:

1. I am the Medical Director of the Bronx Center of Planned Parenthood of New York City, Inc. ("PPNYC"), a Title X grantee. I am a physician licensed to practice medicine in the State of New York and have practiced in the field of family planning for 20 years. I have been medical director of the Bronx Center since 1977, and am also currently medical director of the Community Family Planning Council of New York City. A copy of my resume is attached as Exhibit A.

2. This declaration is submitted to document the irreparable harm that will occur should Plaintiffs' Motion for a Preliminary Injunction not be granted. I raise the injuries the regulations inflict on my right to practice

medicine, and demonstrate how they endanger the life and health of my Title X patients. This declaration is also made on behalf of the class I represent: health professionals in Title X facilities in New York State.

3. Based upon my extensive experience with providing reproductive health care to low-income women, I believe that the new regulations would expose health professionals to liability, undermine the integrity of our medical facility, violate our patient's rights, and harm their health. If we do not obey them, however, we will lose our Title X grant, which will mean a serious cutback in the essential health services we provide to the South Bronx community. Because the regulations are so irreparably harmful, PPNYC cannot obey them. (See Declaration of PPNYC executive director Alfred Moran).

4. The Bronx Center and its self-contained comprehensive health unit for teenagers called the HUB provides comprehensive reproductive health services including health education, counseling, preparation of a detailed medical history, testing for a variety of diseases and disorders including sexually transmitted disease, dispensation of contraception, pregnancy testing, genetic counseling, amniocentesis referral for at-risk pregnant patients, prenatal care, abortion counseling and referral and, if desired, first trimester abortion services. The Bronx Center is an Article 28 state licensed diagnostic and treatment center.

5. The Bronx Center is the major provider of reproductive health services in the South Bronx. In 1986, it provided family planning services alone to 7,138 patients. Between 95 and 97% of the Bronx Center's patients are Black or Hispanic and 40% of its family planning patients are adolescents. Eighty percent of the

Center's patients are either Medicaid eligible or below federal poverty standards.

6. The Bronx Center received $439,391 in Title X funds in fiscal 1987. This grant comprised 20% of its total budget, and 50% of its family planning budget.

7. The services provided by the Bronx Center are of immeasurable value to the South Bronx community. The South Bronx has one of the highest rates of teen pregnancy and infant mortality in the state. The Bronx Center, and the HUB in particular, has specifically targeted these two problems through the provision of early prenatal care and the implementation of special programs for teens. The HUB, a program in existence at the Bronx Center since 1982, provides special comprehensive health care for teenagers and their families and is designed to help them avoid premature and unwanted pregnancy. In addition to its family planning services for adults and teens, it also provides various educational, counseling and recreational programs which seek to address the problems and concerns of the community's teens.

8. Physicians at the Bronx Center perform approximately 2,000 first trimester abortions per year. Second trimester abortions are referred to licensed providers. Most of our abortion services are paid for under New York State Medicaid. No Title X funds are used to subsidize the performance of abortions.

9. Because the new regulations prohibit any form of counseling or information about abortion, even following a diagnosis of pregnancy, if we complied with the new regulations our patients would be exposed to serious physical and mental harm in a variety of situations.

a. Access to information about abortion is essential to the ability of a non-pregnant patient to give informed consent to her choice of contraceptive method. For many patients with diabetes, heart disease, or hypertension, oral contraceptives may present a serious health risk. It is imperative that I inform these patients that use of a diaphragm with the back-up of an early abortion is in fact the safest method of contraception,[17] despite the lower effectiveness rate of the diaphragm versus the pill.

b. No responsible family planning decision can be made without information about every alternative available, including that of abortion, in the event that contraceptive failure occurs. Restrictions on such information are particularly harmful to my Bronx patients because most of them have no other source of information about family planning.

c. All family planning patients need to be told that they must take an early pregnancy test if they think they are pregnant whether or not they choose to terminate their pregnancy or to carry to term. Early abortion is an extremely safe medical procedure; the medical risks of abortion increase as pregnancy progresses. Under the new regulations patients could no longer be informed of this fact.

d. Pregnant patients[] cannot make voluntary

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[17] See Tietze, Bongaarts & Schearer, "Mortality Associated with the Control of Fertility," 8 Family Planning Perspectives (Jan/Feb 1976).

medical decisions in an environment where physicians must actively promote childbirth by forcing prenatal care information, even on those women who have decided to terminate their pregnancies.

e. It is my understanding that under the proposed regulations neither my co-workers nor I will be able to offer proper follow-up counseling to our pregnant patients who have been referred for genetic testing. Counseling is essential for any patient who receives test results indicating that she or her fetus is at risk, and I cannot provide such counseling without discussing the option of abortion if I am to comport with the standards of the medical community and with professional ethics.

10. If I cannot refer my patients for an abortion they will have difficulty locating appropriate abortion services. Those who do locate a provider in time for an abortion will inevitably be delayed. Every week following the eighth week of gestation, increases the risk of abortion morbidity and abortion mortality.

11. Lack of access to licensed medical facilities has been shown not to deter most patients from seeking an abortion. My inability to refer patients to licensed abortion providers would, accordingly, result in an increase in the number of self-abortions and abortions performed under hazardous medical conditions by persons lacking appropriate training rather than an increase in the number of patients carrying to term.

12. Without referrals to licensed abortion facilities, some patients will obtain abortions from providers who

offer second class abortions and post-abortion care. For instance, when it is determined after a blood test that a pregnant patient at the Bronx Center has RH negative (RH-) blood, and her fetus has RH positive (RH+) blood, she is given a Rhogan injection as part of her follow up abortion care. This injection is necessary to prevent complications in future pregnancies by ensuring that the patient does not build up antibodies to RH+ blood. Many non-licensed facilities will not provide this type of follow up treatment. I prefer to refer patients to facilities in which I know they will receive the highest quality care.

13. A minority of uninformed patients could not pursue the option of abortion; others will delay until a stage of pregnancy when the abortion is impossible or too difficult to obtain. The resulting increase in forced motherhood will create heavy social and economic costs, particularly when the mother is an adolescent.

14. Prior to Roe v. Wade I treated countless patients who had attempted self-abortion or who had abortions performed by persons with limited experience. Some women arrived at the hospital with catheters lodged in the uterus and protruding from the vagina. Others douched with a variety of hazardous chemicals, which in many cases caused permanent damage to their vaginal walls. Most often, women arrived who had undergone septic, incomplete abortions. When women are denied information about where to obtain safe abortions from licensed facilities, the likelihood of such incidents occurring again increases.

15. The need for the dissemination of abortion information in the South Bronx community is illustrated by one of my patients who tried to abort herself by

taking Humphrey's II, an over-the-counter drug which has been reputed to cause early abortion by inducing bleeding. While the drug itself is not dangerous, it will induce bleeding and may cause a partial abortion in a pregnant patient, which can seriously endanger her reproductive health. After treating the patient, I asked her why she had endangered her health when she could have obtained a safe and legal abortion. She responded that she didn't know that she could obtain an abortion, or where information about abortions was available. This incident points out the continuing need to disseminate information about the availability of abortion to the Bronx Center's community.

16. In addition to attempts at self-abortion, failure to counsel patients with an unwanted pregnancy, especially in conjunction with the mandatory dissemination of information on prenatal care, would impose additional harm to many patients, particularly adolescents. Such harm would include an increase in teen runaways and teen suicide. Many adolescents whom I diagnose as pregnant suffer from feelings of isolation, panic and fear. Immediate counseling is necessary to quell these feelings and to present these teens with unbiased information about their options. HUB counselors are often instrumental in convincing reluctant adolescents to discuss their pregnancy and the options available to them with their parents or other adult family members.

17. There are distinct and additional harms to the lives and health of my patients for whom an abortion is medically indicated.

a. Without proper abortion counseling and referral my pregnant patients with AIDS, epilepsy, severe diabetes, hypertension, congenital

heart disease or cancer may suffer serious injury or even death. One in 43 babies tested for AIDS in the Bronx are found to carry the AIDS virus. This is the highest figure of AIDS births in New York State. A pregnant patient with AIDS must be told of the risks to her health and to the health of her child. She should also be told about the abortion option. Some of my patients have sickle cell disease; these women have a 25% chance of going into sickle cell crisis and dying as a result of pregnancy. Those of my patients with such conditions must be counseled immediately about the risks involved in carrying their pregnancy to term. If a diabetic patient whose blood sugar fluctuates greatly is diagnosed as pregnant, I must inform that patient of the possibility that she may go into diabetic coma or insulin coma, as a result of the additional stress the fetus places on her system. I am also obliged to tell that patient that the fetus may die at any point in the pregnancy. Because such conditions do not clearly constitute "emergencies" under the proposed regulations, I could not provide such essential counseling but instead would be required to give the patients information on prenatal care, thus steering these women toward the serious health risk of carrying to term.

b. Any pregnant patient with a serious medical condition who wishes to continue her pregnancy is a high risk patient and must be referred to a high risk clinic. The list of prenatal care and delivery services required by the regulations would not be sufficient. Such a patient must be told of the seriousness of her

condition, the threat to her life and to the life of the fetus, and must be immediately referred to a high risk clinic. This referral may include making an appointment for enrollment in a pre-natal program for high risk patients.

18. Requiring that Title X-funded clinics physically segregate family planning programs from abortion services and abortion-related activities would also be harmful to my patients, and would undercut the provision of comprehensive health care currently provided at the Bronx Center. Particularly where teens are involved, integrated services are needed to facilitate enrollment in counseling and family planning programs. Many of our patients first visit the clinic for pregnancy testing or abortion services although they may need counseling, family planning or prenatal care. Because of the proximity of services and personnel, we are able to immediately channel a patient into a program which meets her needs. For example, post abortion patients are immediately enrolled in the Bronx Center's family planning program on the same premises, where after counseling and discussion with a staff health professional, they select a contraceptive method. Prompt enrollment in a family planning program is essential for post abortion patients to prevent future unplanned or unwanted pregnancy, and to encourage a responsible attitude toward sex and reproductive health. Post abortion adolescents are also referred to the counseling program of the HUB. Prompt and successful enrollment of patients in counseling, family planning and pre-natal programs would be impossible if the services were provided on different sites from abortion and abortion-related services. Moreover, making two trips to different locations would often be expensive and difficult for my patients.

19. The detrimental programmatic and financial impact caused by the segregation requirements would be exacerbated by the failure of the new regulations to explain how compliance may be achieved. The regulations expressly state that the list of relevant factors provided is not exhaustive; the evaluation of a Title X clinic's attempt to comply lies wholly within the discretion of HHS. Because of the onerous nature of the separation requirements and the fact that Title X health care providers cannot accurately assess how to comply, rapid judicial assessment of the legality of the new regulations is crucial to the survival of the Bronx Center's family planning program.

20. Compliance with the new regulations would make it impossible for me to practice conscientious medicine. Compliance would expose my colleagues at the Bronx Center and me to the risk of legal liability as well as professional censure.

a. By failing to provide complete referrals and information to patients, I would be violating New York law requiring health care professionals to provide a pregnant women with "sufficient information concerning her condition and alternatives so that she can reasonably decide whether she [is] willing to undergo the entire pregnancy and deliver the child or abort the pregnancy. Becker v. Schwartz 60 A.D. 2d 587 (2d Dept. 1977) modified on other grounds, 46 N.Y. 2d 401, (1978). See also Rivera v. State of New York 94 Misc. 2d 157, 404 N.Y.S. 2d 950, 953 (Ct. Cl. 1978).

b. Recent amendments to the New York State Department of Health's regulations

require that all diagnostic and treatment centers provide patients with referrals "to other providers of health services as indicated by the patient's needs and documented in the patient's medical record.["][18] Compliance with the new Title X regulations would force me to violate this law and expose the Bronx Center to loss of its license and its status as a Medicaid provider.

c. The new Title X regulations would force me to violate basic principles of medical ethics. There are very few circumstances in which a physician may withhold information from a patient about available and safe medical options to treat the patient's medical condition. In almost all cases, everything that is of importance to the patient with regard to her health must be discussed and disclosed. Although no clinician should refuse to provide a woman with services or referrals which would aid her in obtaining optimal medical care, the new regulations would force me and my staff to violate this moral, ethical, and legal duty so long as the HUB received Title X funds.[19]

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[18] 10 N.Y.C.R.R. 753.1(b) (1987).

[19] For example, the American Medical Association ("AMA") authorizes physicians to make referrals to any ". . . provider of health care services permitted by law to furnish such services." The AMA also enumerates only two instances in which physicians may withhold health information from patients -- when the patient is unconscious or "when risk-disclosure poses a serious psychological threat" to the patient. Current Opinions of the Judicial Council of the American Medical Association, 1984. The American College of Obstetricians and Gynecologists requires that:

(continued...)

21. For the foregoing reasons, based on my expertise in the field of reproductive medicine, I believe that the new Title X regulations, if implemented, would result in irreparable harm to indigent women and teens, and would undermine the integrity and the quality of services provided by the HUB Center. The loss of the Title X grant, on the other hand, would decimate the services provided by the Bronx Center, since Title X funds make up 50% of our family planning budget. In a community which has one of the highest infant and maternal mortality rates in New York City, and which has an unemployment rate double the national average, the harm which would result from the loss of an established comprehensive health care facility such as the Bronx Center is inestimable.

WHEREFORE, I respectfully request that the Court grant plaintiff's Motion for a Preliminary Injunction.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 2/5/88 /s/
Irving Rust, M. D.

[Exhibit omitted.]

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[19] (...continued)

> In the event of an unwanted pregnancy, the physician should counsel the patient about her options of continuing the pregnancy to term and offering the infant for legal adoption, or aborting the pregnancy.

American College of Obstetricians and Gynecologists, Standards for Obstetric-Gynecologic Services (1985).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DR. IRVING RUST, ET AL.,	:	
Plaintiffs,	:	
- against -	:	AFFIDAVIT
		88 CIV. NO. 0702
OTIS BOWEN, or his successor, Secretary of the United States Department of Health and Human Services,	:	(LLS)
Defendant.	:	

AFFIDAVIT OF JAMES H. SAMMONS, M.D.

James H. Sammons, M.D., being first duly sworn on oath, deposes and states as follows:

1. I am a physician and the Executive Vice President of the American Medical Association ("AMA"). I am submitting this affidavit on behalf of the AMA in support of Plaintiffs' Motion for a Preliminary Injunction enjoining implementation of new regulations promulgated by the United States Department of Health and Human Services ("HHS") under Title X of the Public Health Service Act ("TITLE X"). 53 Fed. Reg. 2922 et seq. (Feb. 2, 1988). On February 10, 1988, the Board of Directors of the AMA officially authorized the participation of the AMA in legal action to oppose the implementation of these regulations.

2. The AMA is a voluntary nonprofit organization of more than 280,000 physicians and medical students dedicated to promoting the public welfare through the maintenance of the highest professional standards and the provision of quality medical care. In order to achieve these goals, the AMA is committed to preserving the freedom of patients to seek and obtain needed medical care. Concomitantly, physicians must be free to discharge their professional responsibility to provide care and treatment appropriate for the individual patient, according to their best clinical judgment consistent with medical standards.

3. To further these ends, the AMA believes that physicians must be free to disclose to their patients the full spectrum of information and options necessary for informed medical decision making. The "Principles of Medical Ethics" promulgated by the AMA, as elaborated upon in the Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association (1986) specifically acknowledge that:

> "The patient's right of self-decision can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. The patient should make his own determination on treatment. They physician's obligation is to present the medical facts accurately to the patient or to the individual responsible for his care and to make recommendations for management in accordance with good medical practice. The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice."

Opinion 8.07. Thus, every physician has an ethical and professional duty to provide a patient with enough information so that she can make an informed decision as to her medical care.

4. In the opinion of the AMA, the regulations at issue in this case will interfere with the ability of those physicians who happen to be in Title X-funded programs to exercise their best judgment in the manner most responsive to and appropriate for the individual patient's health needs. They will prevent a frank discussion of medical information and artificially constrict the physician-patient dialogue in ways that are inconsistent with sound medical care.

5. In order to understand how these regulations threaten to impair the physician-patient relationship, it is important to recognize that family planning decisions may have critical medical implications. In fact, decisions made in the context of family planning can affect the future life and health of a woman and the fetus she may be carrying.

6. In fact, HHS previously has recognized the inextricably medical nature of family planning services. Until now, Title X programs were required to offer comprehensive "nondirective" counseling to their patients, both nonpregnant and pregnant. These family planning services include medical exams, medical testing for pregnancy or disease, counseling with respect to potential health risks and benefits of contraceptive alternatives or of pregnancy itself, and referrals to other medical providers when indicated or requested. This wide range of information and services was provided so as to ensure that family planning decisions were made on a medically informed basis. Physicians were free to provide medical

advice, in conformance with professional standards of medical care and ethics, and to be responsive to the needs and requests of individual patients.

7. The new regulations, however, restrict the substantive scope of medical counseling that a physician may provide to his or her patients. For example, under the new regulations, once it has been determined that a patient is pregnant, i.e., as a result of a medical exam performed at a family planning clinic, a physician may not counsel or refer with respect to pregnancy termination, even if the pregnancy poses a threat to the woman's life or health and pregnancy termination is an option that the physician, in his or her medical judgment, normally would discuss with the patient at that time. Rather, the woman "must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child." 53 Fed. Reg. 2945 (to be codified at 42 CFR § 59.8(a)(2)). Moreover, the physician must also provide the pregnant woman "with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept." Id. HHS has commented that "acceptable" information would relate to "good health practices during pregnancy" and could not include the possibility of pregnancy termination. 53 Fed. Reg. 2937.

8. Accordingly, these regulations will directly interfere with the ability of physicians in Title X-funded programs to discharge their professional responsibilities and provide their pregnant patients with what is considered to be necessary and appropriate medical information and counseling. Indeed, the AMA is deeply concerned that these regulations will endanger the lives and health of women with medical conditions which may

be exacerbated by pregnancy. Under the new regulations, a woman with a condition such as AIDS, diabetes, hypertension, heart disease, renal disease, sickle cell anemia, or cancer will be deprived of necessary counseling and information -- e.g., that she faces serious health risks as a result of her pregnancy. Professional standards of care require, however, that physicians be free to apprise these women of the seriousness of their condition, and the potential threat to their lives and health. Physicians must be able to exercise their best medical judgment and provide full disclosure of the health hazards that continuation of pregnancy may pose for these women and of all the available medical alternatives. Physicians must be allowed to engage in the frank physician-patient discussions that will permit a patient to choose the appropriate course for herself.

9. Under the new regulations, however, physicians in Title X-funded clinics will not be permitted to provide this information or these vital discussions, despite the fact that continuing the pregnancy may threaten the patient's life or health and even if the patient specifically inquires about the potential medical consequences of her pregnancy. Such limitations on the physician-patient dialogue have heretofore been unknown, and constitute an unacceptable intrusion into the physician-patient relationship.

10. By the same token, certain maternal disorders greatly increase perinatal mortality and morbidity and may require discussion of pregnancy termination as an option pursuant to providing full disclosure of medical information. For example, congenital abnormalities occur two to three times more often among children of diabetic women, and the abnormalities associated with prenatal diabetes are more severe and more often

multiple and fatal. Cousins, Congenital Anomalies Among Infants of Diabetic Mothers, 147 Am. J. Obstet. & Gynecol. 333 (1983). Similarly, a pregnant woman may be infected with a disease such as AIDS, rubella, herpes, cytomegalovirus or toxoplasmosis, that could have devastating effects on her fetus. Consider the child who has been exposed to a rubella infection during the first four weeks of gestation. This child has a 61% chance of developing congenital defects, including ocular and cardiovascular anomalies, deafness, mental retardation, and early onset diabetes. Simpson et al., Genetics in Obstetrics and Gynecology 229-30 (1982). The AMA strongly believes that a physician should be free to counsel a pregnant woman as to the serious threat that her medical condition poses to her fetus. A physician must have the ability to inform the woman, if appropriate in the circumstances of the patient's medical situation and inquiries, that pregnancy termination may be an option. The new regulations, however, will forbid the provision of this information even if the pregnant woman inquires about her medical condition and the effect it might have on her fetus.

11. In addition, some pregnant women may be at high risk of delivering a child with a severe genetic disorder. This group includes women of advanced maternal age (over 35) who are at an increased risk of having a child with a chromosomal abnormality such as Down's syndrome; women in couples, both of whom are members of a high risk ethnic group such as Ashkenazi Jewish couples who are at high risk of having a child with Tay-Sachs Disease; women who previously had a child with a genetic disorder such as polycystic kidney disease; and women who have a history of multifactorial disorders such as anencephaly in their families. See generally, Milunsky, Genetic Disorders and the Fetus (2d

ed. 1986). Professionally established standards of medical care require that physicians be free to inform a patient if she is at an increased risk of having an impaired child and alert her to the availability of prenatal testing and the option of pregnancy termination. The new regulations, however, will forbid this free flow of medical information. Thus, they will deny many women the option of making an informed choice not to carry and deliver a child with a severe and often fatal birth defect.

12. Moreover, any delay in receiving necessary medical counseling and referral information may in and of itself pose serious risks. If a woman with a high risk pregnancy is not told about the availability of prenatal diagnostic procedures, for example, she may terminate her pregnancy simply out of fear of having a severely affected child. Further, if pregnancy termination is necessary, it will be a much safer procedure for the woman if it is [per]formed early in pregnancy.

13. These are merely examples of the variety of medical circumstances in which a physician must be free to mention or discuss the possibility of pregnancy termination, in the interests of providing sound medical care. However, a physician in a Title X-funded clinic will not be able to disclose or discuss pregnancy termination with a patient, even when the patient specifically asks about the medical advisability of such procedure. Instead the physician will be required, regardless of how inappropriate under the circumstances, to inform the woman about "good health practices during pregnancy" and to provide her with an undifferentiated list of health care providers that is designed to minimize the availability of the very procedure which, in any other situation, the physician might explicitly recommend or

make referral for. See 53 Fed. Reg. 2937. The AMA is concerned that these mandatory and inflexible rules for disclosure and nondisclosure will severely limit the free flow of vital medical information that is necessary for the provision of optimal care, and will undermine the physician-patient relationship.

14. Physicians in Title X-funded clinics also will be prohibited from providing appropriate medical information to their nonpregnant patients. As stated earlier, for some women pregnancy may constitute a threat to continued life and health. For a woman with severe hypertension, for example, reliable forms of contraception such as the pill may be medically contra-indicated and pregnancy may threaten her life. If this woman requests information about the medical implications of her contraception options, a physician in a Title X-funded clinic will be forbidden from discussing the safest alternative for her, i.e., the use of a diaphragm with early pregnancy termination as a backup. Such a failure to disclose the best available medical option violates medical and ethical standards. It also negates any informed consent to contraceptive care.

15. As HHS correctly points out, a physician cannot, and should not, be compelled to perform a medical procedure that violates his or her conscience. 53 Fed. Reg. 2929. A physician must be free, however, in conformance with professional standards of care, to exercise his or her best medical judgment as to the need to disclose the availability of that procedure, even if he or she does not or cannot perform it. A physician must be free to inform a woman about any risks to her health, or to the health of her fetus, that may result from continuation of pregnancy and refer her, if she desires, to another physician for further advice, testing or pregnancy

termination. Medical ethics demand no less.

16. In sum, the AMA is deeply concerned that the new regulations seek to legislate medical practice for physicians in Title X-funded programs irrespective of sound medical practice, the physician's best clinical judgement, and the patient's medical needs and wishes. These regulations will force physicians to give their patients medically incomplete and potentially misleading information and referrals. They will compel them to encourage childbirth for all pregnant patients without regard to their critical medical needs and without counseling or discussion about their individual situations. They will denigrate the integrity of the physician-patient relationship. They will force physicians to violate established standards of medical care and professional ethics, and often their own conscience.

17. For the foregoing reasons, it is the opinion of the AMA that the proposed Title X regulations will cause irreparable harm to patients, especially to the indigent women and adolescents whom the program was designed to serve, and will unacceptably undermine the quality of the services provided by physicians in Title X-funded facilities.

18. The AMA intends to seek leave to intervene as a plaintiff in this lawsuit as soon as time permits. This affidavit is submitted to provide the opinions and concerns of the AMA for the Court's consideration upon Plaintiffs' Motion for a Preliminary Injunction on February 19, 1988.

WHEREFORE, I respectfully request that the Court grant Plaintiffs' Motion for a Preliminary Injunction.

FURTHER AFFIANT SAYETH NOT.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on: 2-18-88 /s/

James H. Sammons, M.D.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DR. IRVING RUST, ET AL.,	:	
Plaintiffs,	:	
- against -	:	**DECLARATION**
		88 CIV. NO. 0702
OTIS BOWEN, or his successor, Secretary of the United States Department of Health and Human Services,	:	(LLS)
Defendant.	:	

LORRAINE TIEZZI declares under penalty of perjury as follows:

1. I am the director of the family planning clinics at The Presbyterian Hospital in the City of New York ("Presbyterian Hospital"). I submit this declaration in support of plaintiffs' motion for a temporary restraining order and/or preliminary injunction enjoining implementation of regulations promulgated under Title X of the Public Health Service Act ("Title X"). I also submit this declaration in support of plaintiffs' request for an early hearing date.

2. Presbyterian Hospital is a not-for-profit corporation organiz[ed] under the laws of the State of New York. Presbyterian Hospital provides acute in-patient care and out-patient medical care, including

family planning and abortion services.

3. Presbyterian Hospital provides family planning services for adults and for young adults under 21 years of age. The adult clinic operates five days a week performing pregnancy testing and providing contraceptive services. On three days family planning and reproductive counseling sessions are conducted. The young adult clinic operates two evenings and one afternoon a week and a separate clinic for young men is operated one night a week. The family planning clinics are operated as part of the obstetrics and gynecology clinic at Vanderbilt Clinic of Presbyterian Hospital. The clinic performs the following services: gynecological examinations, provision of contraceptives, cancer screening (including pap smears and breast examinations), and pregnancy testing. Patients are referred to other clinics at Presbyterian Hospital for other medical services, including services relating to pregnancy and infertility.

4. In 1986, Presbyterian Hospital's family planning clinics served approximately 7,400 patients, approximately 2,500 of whom were under twenty-one years old. Fees are charged on a sliding scale and a substantial percentage of the family planning clinics' patients have Medicaid.

5. In 1987, Presbyterian Hospital received a Title X subgrant of $480,247 from the Medical and Health Research Association of New York City, Inc. The only other source of funds for the family planning clinics is from Medicaid. Income received from patients is insignificant. The Title X grant and the Medicaid funds enable the Hospital to provide family planning services for low-income women and young adults.

6. Abortions are performed at Presbyterian Hospital on a separate floor of the same building in which the family planning clinic is located. The family planning clinic and abortion services are both part of the OB-GYN clinic, and thus share the same entrance, and waiting and reception areas. The abortion services and the family planning clinic also share the same patient records, and billing is done through the same office.

7. Pregnant women who come to the family planning clinics are given extensive options counseling. Those who express the desire to terminate their pregnancies are referred to a counselor in the abortion service, who refers the patients to licensed Article 28 clinics and hospitals, including Presbyterian, which perform abortions. Those women who wish to continue their pregnancies are referred to Presbyterian's prenatal clinic.

8. The new Title X regulations would irreparably harm Presbyterian Hospital's family planning program and patients in the following ways:

a. Presbyterian's family planning clinics serve a primarily low-income, immigrant population in the Washington Heights section of Manhattan. The vast majority of these people use Presbyterian Hospital as their primary care facility, i.e., they do not have and can not afford private doctors. Washington Heights and the surrounding areas where patients of the clinic reside, are underserved by private doctors. There is no other facility in the Washington Heights area which provides these kinds of family planning services and counseling,

and the patients the Hospital serves are unlikely to go elsewhere in New York City to obtain family planning services. Thus the curtailment of options counseling, which is compelled by the new regulations, would irreparably harm the patients the Hospital serves because they would get inadequate and incomplete counseling to make reasoned and informed judgments about whether to continue or terminate their pregnancies. In particular, the young adults who come to the family planning clinic are unsure about whether to carry their pregnancy to term or to terminate the pregnancy. The Hospital's counselors, social workers, and physicians explain all of the options, including childbirth, life planning, adoption, and abortion. Patients for whom abortion is medically necessary could suffer irreparable physic[al] and mental harm, or in extreme cases, death, if they were not informed of the abortion option. Thus, the ability to provide comprehensive medical care to low-income women and young adults would be directly impaired by the new regulations.

b. Presbyterian Hospital serves patients with medical problems, including diabetes, cancer, AIDS, and IUD failure. Under the new regulations, the medical ethical standards of physicians and other professional staff at Presbyterian's family planning clinics may be called into question should they have to refuse to counsel pregnant patients for whom an

abortion may be medically indicated. If the professional staff were precluded by the new regulations from counseling high risk pregnant patients about the dangers to both the mother and the fetus of continuation of pregnancy, they could be subject to legal claims based upon lack of informed consent.

c. As written, the new regulations mandate that any woman who is found to be pregnant must be referred to a prenatal clinic. Thus, physicians, nurses, and counselors in the family planning clinics would be prohibited from answering any of the pregnant patient's questions about family planning or abortion. This makes the provision of continuous, comprehensive care tailored to the individual patient's needs nearly impossible. Furthermore, this places medical professionals in a clear dilemma regarding their professional ethics, which require that full information be given to patients. Medical professionals who find their ethical standards compromised by the new regulations may cease working for the family planning clinics.

d. The new regulations also require physicians to provide prenatal care information to every pregnant patient. In such an environment of pressure toward the option of carrying to term, it is extremely difficult for a patient to make a truly voluntary family planning decision.

e. Presbyterian Hospital may have to redesign or relocate its family planning clinics, because of the requirement that personnel, equipment, and physical location of abortion services be physically separated from the Title X-funded family planning services. Such separation would not likely be financially or practically feasible for the Hospital.

f. When a counselor is prohibited from answering questions by pregnant and non-pregnant women about abortion, the relationship of trust and confidence that has been built up may be irreparably damaged. Low-income women and young adults will probably suffer an increase in unwanted pregnancy and continued ignorance about their legal and medical options. Moreover, this failure to provide complete, truthful, non-judgmental information would create a serious loss, particularly for Presbyterian's young adult patients, who have had a limited and often inaccurate education about sexual matters, and who are often unsure and afraid when they come to the clinic and are seeking counseling and information as to all possible options.

9. Presbyterian Hospital has the option of relinquishing Title X funds or drastically redesigning the services currently offered at the family planning clinic to comply with the new regulations. However, the first option would likely mean elimination of the program, because Title X funds provide approximately 75% of the

program's funds, and the women and young adults who utilize the Hospital's services would be financially unable to pay the fees that would have to be charged to continue the operation of the program. Thus, if Presbyterian Hospital did not receive Title X funds it is likely that the family planning clinics could no longer operate because the Hospital does not have other funds available for this program. Choosing the second option would result in the exclusion of essential services vital to the indigent women and young adults who utilize Presbyterian as their primary health care provider. The difficulty of this decision and the time necessary to implement either choice makes a rapid determination of the legality of the new regulations extremely important.

10. Implementation of the new Title X regulations would irreparably harm Presbyterian Hospital's program and the patients the Hospital serves. These regulations will deny the Hospital's patients the ability to make informed choices and will expose pregnant patients to both physical and psychological risks, by prohibiting all counseling for pregnant patients, and prohibiting abortion referrals for patients who require such services.

WHEREFORE, I respectfully request that the Court grant plaintiffs' Motion for a temporary restraining order and/or preliminary injunction.

Executed on February 4, 1988

/s/
Lorraine Tiezzi

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DR. IRVING RUST, ET AL.,	:	
Plaintiffs,	:	
- against -	:	
		AFFIDAVIT
OTIS BOWEN, or his successor, Secretary of the United States Department of Health and Human Services,	:	
Defendant.	:	

State of New York)
) ss:
County of New York)

Michaele P. White, being duly sworn, deposes and says:

1. I am the Administrator of Health Resources of The DOOR - A Center of Alternatives, and I submit this Affidavit in support of the Plaintiffs' Motion for a Preliminary Injunction. My Curriculum Vitae is attached hereto as Exhibit A. As set forth in more detail below, any interference with the provision of comprehensive services and referrals, to pregnant adolescents by Title X family planning clinics will have a deleterious effect on our society's most disadvantaged teenagers, and, in many

cases, on their children.

2. The DOOR is a multi-service center for young people from ages 12 to 21, serving the New York City region from its location in lower Manhattan. Founded in 1972, The DOOR is a nationally recognized model program for providing comprehensive services to young people. Among its many awards, The DOOR received the 1987 Society For Adolescent Medicine Hilary Miller Award for Innovative Approaches to Adolescent Health Care, and was chosen by Nancy Reagan's Drug Abuse Fund as one of two funding recipients for 1987. The history and background of The DOOR are set out in detail in the brochure attached hereto as Exhibit B.

3. Among The DOOR's services is a health center staffed by consultant physicians, nurse practitioners, nurses, social workers and other health professionals. The health center provides primary care to over 3,200 young people annually, many of whom have no other source of health care. Other services include nutrition, social work, psychological counseling, education, career counseling, legal services and a full range of creative and recreational workshops. One of the keys to The [DOOR]'s success is its ability to provide on-site referrals from one service to another. Thus, a teacher can easily refer a young person to the social work or other department by accompanying the young person to the appropriate service.

4. In the health center, our caseload includes large components of family planning, pregnancy verification, perinatal and well-baby care. Funding for these programs is provided in part by Title X, New York State Family Planning Grants, and other governmental and private grants and donations. During my 15 years at The

DOOR's health center, I have had occasion to be directly involved in, and to observe, the provision of these health care services to thousands of young people. Many of these young patients have no other place to which they can turn for information and support regarding their family planning and other health care needs. Many of these young people enter The DOOR's health care program and other programs through its family planning component, and our professional staff are thereby able to detect a number of serious health care and other problems that would not otherwise have been found.

5. As patients, young people present unique treatment problems not presented by adult patients, and assumptions about the behavior of adult patients cannot simply be projected onto the care of young people. Moreover, the capacity to provide comprehensive counseling and referrals on all of the issues raised by a pregnancy is extremely important because teenager[s] lack information and support. Pregnancy causes a crisis which could lead to extreme problems (e.g., suicidal ideation which requires psychological evaluation and counseling). To the extent the regulations inhibit such counseling and referrals, they will have a negative impact on many teenagers.

6. We have observed over the years that many young people lack the motivation and/or ability required to be effective health consumers. They tend to require extensive follow-up to ensure compliance with even the simplest prescribed treatment regimes. In the case of complex treatments for which we lack the appropriate facilities, we must refer young people to other providers, generally hospitals. Even when a referral is made to a particular clinic at a specified hospital (e.g., for a sonogram at X Hospital), many young people encounter

obstacles to treatment at such institutions and seek our assistance. Any inhibition of our ability to assist young people in this situation could have negative consequences for the health of the young person.

7. Based on my many years of experience treating adolescent patients, it is my professional opinion that incomplete referrals to a list of general providers, as are apparently called for by the challenged regulations, will in the majority of cases, result in a significant delay in treatment, and in some cases a lack of treatment altogether.

8. The DOOR and other adolescent family planning programs are successful because young people know that they can trust and rely upon the professional staff for unbiased counseling and treatment, and for complete and accurate information. To the extent that the regulations prohibit providers from answering certain inquiries by patients concerning all of the issues raised by a pregnancy, young people's faith in the medical profession and their likelihood of continuing treatment (pre-natal care, etc.) following referral recommendations will decrease as well resulting in harm to the young person's health. Moreover, young people would stop turning to The DOOR and other providers for health care, and thus serious problems might go undetected.

9. In the case of pregnancy and perinatal care, any delay in establishment of a relationship with the appropriate provider can have important negative consequences on both maternal and infant health. Numerous studies have established the correlation between early perinatal care and infant health. The children of teenagers are most likely to be low birth weight and to have other serious medical problems. Yet,

early perinatal care can greatly decrease these risks.

10. Up to the promulgation of the challenged regulations, the Title X program and other federal programs have recognized the importance of comprehensive services and of medically appropriate referrals. The challenged regulations' reduction of all pregnancy-related referrals to handing a pregnant young woman a list of general providers is impractical in the context of the adolescent patient, for the reasons already noted. Thus, it is not difficult to postulate that the challenged regulations' inhibitions of pregnancy-related care referrals will contribute to an increase in low birth weight babies and other negative outcomes of teenage pregnancies.

11. For the reasons stated herein, I respectfully urge that implementation of the challenged regulations be enjoined so that the Title X program can be refocused on the most important aspect of its statutory purpose: making comprehensive, high-quality family planning services available to young people in the most effective manner.

/s/
Michaele White

Sworn to before me this
15th day of December, 1987

EXCERPTS FROM AFFIDAVITS

MARILYN BENNETT
Executive Director of Health Services of Hudson County, New Jersey ("Hudson Health")
February 5, 1988

* * * *

7. Jersey City, in which Hudson Health is located, has a population of approximately 23,532 people. Of this population, approximately 25.9% are below the poverty line.[1] The infant mortality rate in Jersey City is the second highest in the state. In fact, Jersey City's infant mortality rate far exceeds that of most Western nations in the world and points to the compelling need for quality health and family planning services in Jersey City.[2]

8. Hudson Health provides services to approximately 9,000 women per year. Of these patients approximately 30% are teenagers and 85% are medicaid eligible. * * * There is no other comparable medical facility in Jersey City.

* * * *

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[1] Figures are from 1980 Census reports for Jersey City.

[2] According to the New Jersey State Department of Health, Jersey City's infant mortality rate for 1983 was 20.4. Compare with rates of 12 for the United States and the United Kingdom, and 10 and 13 for France and the Federal Republic of Germany, respectively. See World Health Statistics 1984, World Health Organization, United Nations.

24. Moreover, our philosophy of providing integrated services will be undermined by the separation requirement of the regulations. Hudson Health recognizes the benefits for women of the availability of counseling and the means of obtaining all reproductive health options at a single health center. Provision of comprehensive integrated services results in higher quality health care for women and encourages awareness among patients of the connection between responsible family planning, planned pregnancy, early prenatal care and healthy babies, as well as the relationship between uninformed or careless birth control habits and unwanted pregnancy.

* * * *

RUTH KLEPPER
Executive Director of Upper Hudson Planned Parenthood ("UHPP")
February 5, 1988

* * * *

16. Approximately 26 per[cent] of our clients visit a UHPP clinic for the first time because they suspect that they are pregnant. Indeed, because pregnancy or family planning/contraceptive needs are of immediate concern to most women of reproductive age, they are likely to seek health care for these concerns first. UHPP currently provides these women with comprehensive health care and education for their reproductive needs, thereby enabling women to take charge of their own health and obtain appropriate health care. Without the comprehensive exams, counseling and referrals we provide, many women would not identify their health problems or receive appropriate treatment because they have chosen

not to, or have been unable to access routine health care.

17. During 1986, 18 percent of our patients were diagnosed as pregnant. Of these, 72 percent requested referrals for abortion services. After discussions and counseling with our professional staff, UHPP provides the patient with detailed referral sheets that enable her to contact an appropriate provider.

* * * *

ROBERTA MERRENS
Executive Director of Northern Adirondack Planned Parenthood ("NAPP")
December 22, 1987

* * * *

5. 76% of our patients receive subsidized services at our clinic -- services which are either free of charge or on a sliding scale basis. No other provider of family planning services in this area provides these services at no cost or on a sliding scale basis. The nearest providers of subsidized family planning services who would serve this population are one and a half hours away by ferry in Vermont or one and a half to two and a half hours away by car on roads covered by snow 6-8 months of the year. For many [of] our patients, a visit to NAPP is their first entry into the health care system; indeed, for some, it is their only source of regular health care.

* * * *

15. Without the benefit of discussion, many of our patients -- particularly our teens and adolescents -- will

be unaware of the choices available to them. I cannot overemphasize that many women we serve do not know that abortion is a safe and legal option to unwanted childbearing.

16. Furthermore, many women seeking abortions are unfamiliar with the procedure and of the greater health risk associated with obtaining an abortion after the first trimester. Under the regulations, our counselors will be precluded from telling their patients of this health risk and from encouraging the patient not to delay in getting the abortion. In addition, providers of abortion services are located at varying distances from our clinic. Without advice as to the proximity of providers, many women will travel needlessly long distances -- on roads covered by snow much of the year -- to procure an abortion. As a result, many of our patients may obtain abortions at a later time than they would if we counseled them, thereby increasing the danger to their health.

17. The regulations bar NAPP from counseling a woman regarding abortion even if she is at risk if she continues her pregnancy. This bar exposes our clients to grave health dangers; unaware of the necessity of obtaining an abortion, many women will dangerously continue the pregnancy, placing themselves in a life-threatening situation. Others may seek an abortion, but will not realize the necessity of doing so quickly. Finally, others may seek an abortion but may encounter health endangering delays as a result of the counselor's inability to tell the patient of the closest providers. These health dangers are not lessened, as the regulations suggest, because we are permitted to refer the woman to a medical specialist who can treat her illness and who can advise her regarding potential health risks. Rather, this additional referral -- instead of direct referral to an

abortion provider -- simply builds in an extra level of delay.

* * * *

KATE D. POTTEIGER
Director of Planned Parenthood of Tompkins County ("PPTC")
December 15, 1987

* * * *

9. Teens are often referred to PPTC through the Suicide Prevention Counseling Service. If a teen contacts the Line, she would most likely be referred to PPTC for testing and/or counseling. Many of the teens we counsel choose abortion after extensive non-judgmental, non-directive counseling, and are referred for that service. I would estimate that 5 10-14 year olds were referred for abortion and 137 15-19 year olds were referred for abortion in 1986.

10. Women suffering from a variety of medical disorders are at risk if they continue their pregnancies. I would estimate that 10-12 patients a year with medical problems are referred for abortion, perhaps one-third to one-half of whom are on Medicaid. For example, we have referred a woman with AIDS for abortion, as well as a woman with a past history of cancer; a woman with psychiatric illness under medication; an IV drug user and a woman with moderately severe cerebral palsy. We refer one or two patients per year who are suffering from ectopic pregnancies. We refer one or two patients a year for abortion who have been raped.

* * * *

No. 89-1391

Supreme Court, U.S.
FILED
JUL 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DR. IRVING RUST, on behalf of himself, his patients, and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

LAURENCE H. TRIBE
KATHLEEN M. SULLIVAN
1525 Massachusetts Avenue
Cambridge, MA 02138

RACHAEL N. PINE
(*Counsel of Record*)
JANET BENSHOOF
LYNN PALTROW
KATHRYN KOLBERT
STEVEN R. SHAPIRO
LOUISE MELLING
ROBIN ABRAMS
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800 ext. 520

(*Counsel Continued On Inside Front Cover*)

PETITION FOR CERTIORARI FILED MARCH 1, 1990
CERTIORARI GRANTED MAY 25, 1990

NORMAN SIEGEL
ARTHUR EISENBERG
New York Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 382-0557

Of Counsel:

ROGER K. EVANS
Planned Parenthood Action
Fund, Inc.
810 Seventh Avenue
New York, New York 10019
(212) 541-7800

LAURIE R. ROCKETT
Hollyer, Jones, Brady, Smith,
Troxell, Barrett & Chira
342 Madison Avenue
New York, New York 10173
(212) 818-1110

QUESTIONS PRESENTED

1. Whether regulations prohibiting abortion counseling, referral, and advocacy, while requiring physicians to provide information and referrals for prenatal care to protect the "unborn child," violate the First Amendment (a) by imposing viewpoint-discriminatory conditions on the speech of private health care professionals employed in Title X funded family planning programs; and (b) by penalizing the right of Title X grant recipients to speak freely about abortion with non-Title X funds.

2. Whether regulations requiring physicians to provide incomplete and misleading information to women diagnosed as pregnant at Title X clinics violate the Fifth Amendment.

3. Whether Title X's prohibition on the use of federal funds "in programs where abortion is a method of family planning" should be construed not to authorize regulations that raise serious constitutional questions; that are not required or expressly contemplated by the statute's text; that are at odds with the statute's structure and history; and that were promulgated after nearly two decades of administrative interpretation of the statute to permit neutral abortion counseling and referral.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the Second Circuit are those in the caption (appellants in C.A. No. 88-6206 and petitioners herein) as well as the State of New York, the City of New York, and the New York City Health & Hospitals Corporation (appellants in C.A. No. 88-6204 and petitioners in No. 89-1392).

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OPINIONS BELOW

The decision of the district court is reported at 690 F. Supp. 1261 (S.D.N.Y. 1988). 9-32a.[1] The decision of the court of appeals is reported at 889 F.2d 401 (2d Cir. 1989). 35-67a. The Second Circuit granted an injunction pending review on certiorari by this Court on November 21, 1989. 68-69a.

JURISDICTION

The final judgment of the court of appeals was entered on November 1, 1989. The petition for writ of certiorari was filed on March 1, 1990 and granted on May 29, 1990. 110 S. Ct. 2559 (1990). This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

U.S. Const. amends. I, V, XIV.

Family Planning Services and Population Research Act of 1970, 42 U.S.C. §§ 300-300a-6a (1982). J.A. 3-12.

Regulations Governing Grants for Family Planning Services, 42 C.F.R. §§ 59.2, 59.5, 59.7, 59.8, 59.9, 59.10 (1988). 1-8a.

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1 The opinion is reprinted in the Appendix to Petitions for Writ of Certiorari in *Rust v. Sullivan* and *New York v. Sullivan*. Citations to the Appendix to the Petitions for Certiorari are made as "__a." Citations to the Joint Appendix accompanying Petitioners' briefs in this Court are made as "J.A. _____." Citations to other materials in the record below will be to "__A" (referring to the joint appendix filed in the Second Circuit) or by name and date of document. References to affidavits and declarations in the record, but not included in an appendix in this Court, will be to "Name ¶ _____ (date)" with a cross citation to "_____A" where available. The challenged regulations, cited as "§ __," are reprinted herein as Exhibit A for the convenience of the Court.

STATEMENT OF THE CASE

A. Introduction

At issue in this case are regulations promulgated in 1988 by the Secretary of the United States Department of Health and Human Services ("HHS") and codified at 42 C.F.R. §§ 59.2, 59.8, 59.9, 59.10 (1988). The regulations were purportedly promulgated under the authority of the Family Planning Services and Population Act of 1970, 42 U.S.C. §§ 300-300a-6a (1982) ("Title X") at J.A. 3-12, which authorizes federal subsidies for family planning clinics serving predominantly low-income clients. Since Title X was enacted in 1970, Congress has barred the use of funds for the provision of abortions as "a method of family planning," 42 U.S.C. § 300a-6 ("section 1008") at J.A. 10, but until 1988 HHS had consistently interpreted this directive as having no bearing on speech and information between a doctor or counselor and her patient and had expressly permitted nondirective abortion counseling and referral by Title X programs. In sharp contrast, however, and without any intervening directive from Congress, the new regulations decree an end to the era of full medical information for pregnant women at Title X clinics.

B. The Nature and Purpose of Title X

Title X is the single largest source of federal support for family planning and reproductive health care.[2] Enacted to subsidize "the establishment and operation of voluntary family planning projects," 42 U.S.C. § 300(a) at J.A. 3, Congress has appropriated between one and two million dollars per year for approximately 3900 clinics nationwide serving nearly five million low-income clients annually.[3] Title X, like Medicaid and Medicare, does not establish federal health care agencies, but rather constitutes a collaborative effort with the private sector, including nonprofit and public health care

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2 Seventy-seven percent of all family planning clinics received Title X funds. Torres, *The Effects of Federal Funding Cuts on Family Planning Services, 1980-1983*, 16 Fam. Plan. Persp. 134, 135 (1984) (Table 1).

3 *See generally* Dryfoos, *Family Planning Clinics—A Story of Growth and Conflict*, 20 Fam. Plan. Persp. 282 (1988).

agencies at a state and local level, to provide reproductive health information and services.[4] Although many of these agencies are supported largely by federal grants or reimbursements from a variety of sources, they also receive substantial funds from state and private sources including charitable contributions and fees from clients who can afford to pay. *See* § 59.5(a)(7), (8).[5] The overwhelming majority of these women are poor, however, most having incomes below 150% of the poverty line. J.A. 160, 171.

As the legislative history makes clear, the overarching goal of the Title X program was to expand access to those services necessary for low-income women at risk of unintended pregnancy. Congress was concerned, above all, that family planning choices be left to individual conscience. *See* 42 U.S.C. § 300a-5 at J.A. 10.[6]

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4 In New York, for example, 32 of the 41 funded agencies are private, nonprofit organizations. *See* J.A. 160; Gesche (Ex. A) at 555A.

5 Nationally, in 1983, only 33% of Title X agencies reported that Title X grants were their mean largest single source of support; the balance of their funding came from a combination of Title XIX funds (Medicaid), Maternal and Child Health Services Block Grants ("Title V"), Social Services block grants, state and local government funds, patient fees, and other private sources. Torres, *supra* note , at 136 (Table 3). For example, the South Bronx Center of Planned Parenthood of New York City ("PPNYC"), Health Services of Hudson County, New Jersey ("Hudson Health"), and Planned Parenthood of Westchester/Rockland ("PPW/R") derive respectively 50%, 33%, and 23% of their family planning budgets from Title X funds. 11a. Similarly, 70% of the budget of the Tremont Clinic Family Planning Service, run by the service division of the Medical and Health Research Association of New York ("MHRA"), is supported by Title X funds. Fink ¶ 9 (Nov. 9, 1989).

6 Members of Congress repeatedly stressed that a central purpose of Title X was to enable "all individuals . . . within the dictates of their conscience, to exert control over their own life destinies." 116 Cong. Rec. 24092 (1970); *see also id.* at 24093 (purpose was to "enable all couples to regulate fertility according to their individual consciences"); *id.* at 37384 (1970) (family planning programs must recognize that "no one should seek to impose his personal or religious convictions upon others"); *id.* at 37388 (1970) ("We must be very careful to safeguard the religious and moral convictions of all of our citizens . . . ."). Indeed, for many women, reproductive decisions including whether or not to have an abortion are religious in nature.

(footnote continued)

C. The Services Provided by Title X Clinics

Title X clinics are frequently the only low-cost providers of basic medical services and reliable health information for a dependent client population that suffers from disproportionately high rates of teenage pregnancy, infant mortality, sexually transmitted disease, and AIDS. *E.g.*, J.A. 142-44, 244-45.[7] In recognition of these facts, Congress intended Title X clinics to offer a comprehensive array of diagnostic and referral services. *See infra* Point IIIB(3).

Title X clinics in New York as elsewhere typically provide not only contraceptive information and services, but also related medical tests and advice. They are required to provide general physical examinations including an examination of blood pressure, thyroid, heart, lungs, breasts, and reproductive organs. *See* United States Dep't of Health & Human Servs., *Program Guidelines For Project Grants For Family Planning Services* § 8.3 (1981) ("*1981 Guidelines*") at J.A. 67. These clinics also test for sexually transmitted diseases, *id.* at J.A. 68, and, in some circumstances, offer counseling, education, and referral for AIDS. Memorandum from Nabers Cabaniss, Deputy Ass't Sec. for Pop. Affairs, to Regional Health Admin'rs (Dec. 8, 1987) at J.A. 72-75. Title X clinics also treat minor gynecological problems and provide general "health maintenance services." *1981 Guidelines* §§ 9.1-.2, 9.4 at J.A. 68, 70-71. Some clinics provide adoption and prenatal care services and some also provide abortion services. It is undisputed that Title X funds are not used to subsidize abortion services. *E.g.*, 11a.

E.g., Dennis ¶ 8 (Feb. 5, 1988); *see also McRae v. Califano*, 491 F. Supp. 630, 741-42 (E.D.N.Y. 1980), *rev'd on other grounds sub nom. Harris v. McRae*, 448 U.S. 297, 320 (1980); 116 Cong. Rec. at 37375 (1970).

7 In the urban areas served by New York providers, for example, the percentage of women infected with AIDS is among the highest in the nation. *See* J.A. 199; Minkoff ¶ 6 at 647A. One in every 60 women giving birth in New York City is HIV infected, with the rate rising to one in 50 in Manhattan and the Bronx. Gesche (Ex. F) (New York State Dep't of Health, *Newborn Seroprevalence Study* (1988)) at 563A. Thirty to fifty percent of the children born to these women will be infected. *Id.*

D. The Challenged Regulations

In a sharp break with prior administrative practice, *see infra* Point IIIB(4), the Secretary proposed on September 1, 1987 and promulgated on February 2, 1988 regulations introducing novel restrictions on the speech of health professionals working in Title X projects. For the first time, the Secretary interpreted section 1008 to bar Title X recipients from providing even nondirective counseling about or referral for abortion, while requiring them to counsel about and refer for prenatal care, § 59.8(a)(1), (2); to require not only financial but also wholesale physical separation of activities conducted with Title X funds from prohibited activities, § 59.9; and to bar all advocacy or other activity that renders the abortion option more accessible to the low-income women served by the program, § 59.10.

1. The abortion counseling and referral ban

The undeniably central function of the Title X program is to fund contraceptive services for a sexually active population. By definition, this population of new and ongoing family planning patients are at risk of unintended pregnancy. Although the regulations purport to refocus the Title X program on "preconceptional counseling" and away from "pregnancy care," § 59.2; *see* Preamble to Final Regulations, 53 Fed. Reg. 2927 (1988) ("Pr., ____"), they have not changed the facts of life. Under current medical technology, no method of birth control used in the United States is 100% effective.[8] In addition, some women become pregnant as a result of rape or incest[9] and the number of unintended preg-

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8 The typical failure rates of various contraceptive methods in the first year of use are: oral contraceptives, 3%; IUD, 3%; condom, 12%; diaphragm, 18%; sponge (parous women, 28%; nulliparous women, 18%); cervical cap, 18%; withdrawal, 18%; natural family planning, 20%; spermicides, 21%; chance, 85%. Trussell, Hatcher, Kates, Stewart & Kost, *Contraceptive Failure in the United States: An Update*, 21 Stud. in Fam. Plan. 51, 52 (1990).

9 About 16,000 women who are pregnant as a result of rape or incest have abortions each year. Alan Guttmacher Institute, *Facts in Brief: Abortion in the United States* (1990). *See generally* Department of Justice, Bureau

nancies nationwide is astoundingly high.[10] Thus, on a daily basis, Title X physicians encounter patients who are pregnant and do not know it, patients who suspect they are pregnant and seek confirmation of pregnancy, and patients who know they are pregnant and seek information. Indeed, concern about a possible pregnancy is a common reason for a first visit to a Title X family planning clinic[11] and pregnancy tests are frequently administered before prescribing some contraceptive methods such as the intrauterine device ("IUD") or birth control pills.[12]

For these reasons, Title X clinics, like 99% of all family clinics nationwide, provide pregnancy tests.[13] The new regulations neither eliminate this basic service nor proscribe all counseling of pregnant women by Title X projects. To the contrary, they continue to provide for services to pregnant women—but selectively.[14]

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of Justice Statistics, *Advance Press Release* at 3, 4 (May 13, 1990) (127,360 cases of rape or attempted rape in 1988). One rural Title X program in New York reported 15 patients in one year whose pregnancy resulted from rape. J.A. 155.

10 In 1982, 54% of pregnancies were unintended, amounting to a total number of 2.9 million (excluding miscarriages). Forrest, *Unintended Pregnancy Among American Women*, 19 Fam. Plan. Persp. 76 (1987).

11 *See* J.A. 150; Bennett ¶ 11 at 498A; *see also* National Research Council, National Academy of Sciences, *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing* 174 (1986). Nationally, two-thirds of all first visits to a family planning clinic include a pregnancy test. *Id.* at 155.

12 *Id.*; *cf. Physicians Desk Reference* 1558 (1990) (oral contraceptives should not be taken when pregnant); A. Guttmacher, *Pregnancy, Birth & Family Planning* 482 (1986) (insertion of IUD when one is confident of non-pregnancy).

13 *See* Torres, *supra* note 2, at 137 (Table 4) (99% of all family planning clinics nationwide provide pregnancy tests and 92% provide pregnancy counseling).

14 For example, all pregnant women will continue to receive prenatal counseling regarding "the health of . . . [the] unborn child," § 59.8(a)(2), including "information regarding good health practices during pregnancy," Pr., 53 Fed. Reg. 2937. In addition, the Title X provider may discuss the option of adoption and may refer women for treatment of conditions, other than pregnancy, diagnosed at the clinic. Pr., 53 Fed. Reg. 2927, 2937.

Section 59.8(a)(1) of the new regulations provides that a "Title X project may not provide counseling concerning the use of abortion . . . or provide referral for abortion." Rather, under the new regulations, "once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child." § 59.8(a)(2).[15] If a pregnant client asks for information about abortion or its availability,[16] the Title X physician or counselor is to reply that "the project does not consider abortion an appropriate method of family planning." § 59.8(b)(5). Thus, as between two mutually exclusive choices legally available to a pregnant woman, counseling and referral is forbidden about one and compelled about the other.

The new regulations further require that the mandatory referral list for prenatal care itself be skewed against the option of abortion. The list must include any available prenatal care providers "who do not perform abortions," but may not include providers "whose principal business is the provision of abortions." § 59.8(a)(3), (b)(3), (b)(4). It is undisputed that the latter requirement would effectively eliminate from the referral list most abortion providers accessible to low-income women. 82a. Indeed, 70% of abortions nationally and 73.5% of those in New York are performed at clinics that might be considered to "principally" provide abortions. *Id.* Only hospitals, which are geographically or economically inaccessible, and private practitioners, who gen-

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15 The only exception to the mandatory referral for prenatal care arises when "emergency care is required," at which time "the Title X project shall . . . refer the client immediately to an appropriate provider of emergency medical services." § 59.8(a)(2). The exception applies only where continued pregnancy would be life-threatening, *e.g.*, Pr., 53 Fed. Reg. 2937, and does not, in any event, permit a physician to call attention to the relationship between a patient's pregnancy and her medical condition. Pr., 53 Fed. Reg. 2937; J.A. 174-75.

16 At some Title X programs as many as 72% of patients diagnosed as pregnant request referrals for abortion services. J.A. 284. Nationally, 46.8% of all unintended pregnancies end with an abortion. Forrest & Singh, *Public-Sector Savings Resulting from Expenditures For Contraceptive Services*, 22 Fam. Plan. Persp. 6, 9 (1990) (Table 2).

erally do not accept Medicaid or provide reduced-cost care, could be included on the list. J.A. 156, 181-82. Moreover, the Title X physician is prohibited from identifying those providers on the list, if any, that perform abortions. *See* § 59.8(a)(3).

The undisputed evidence below, *see* 10a; 41a, shows that the regulations will cause substantial harm to the women served by the Title X program. Most women will be subjected to dangerous delays in obtaining an abortion[17] and some women may be driven to acts of desperation or into continuing unwanted pregnancies.[18] Further, the regulations prevent Title X physicians from advising women with serious medical conditions, such as hypertension, diabetes, and sickle cell anemia,[19] which are not emergencies under the regulations, *see* J.A. 254-55, that continuation of pregnancy may aggravate long-term risks and jeopardize health. For example, a woman with a severe congenital heart disease who becomes pregnant cannot be told that she may face up to a fifty percent chance of death as a result of the tachycardia, increased

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17 Delay increases the mortality risk for abortion 50% each week after the eighth week of pregnancy and the risk of major complications 30% each week. J.A. 227, 192-95. *See* Henshaw, *Induced Abortion: A World Review, 1990*, 22 Fam. Plan. Persp. 76, 81 (1990).

18 For example, if a thirteen-year-old incest victim who lives in Cayuga County, one of the counties in New York without any abortion providers, becomes pregnant, she will have to call provider after provider on the list until she happens to stumble upon one that tells her she can have an abortion and where. Some young women may be deterred entirely while others may turn to unlicensed providers or attempt self-abortion. *E.g.*, J.A. 252, 254. Still others, particularly teenagers, may run away from home to conceal pregnancies or may become suicidal. J.A. 219-20; *see* J.A. 286.

19 Hypertension, for example, complicates about eight to ten percent of pregnancies. *Clinical Obstetrics* 645 (C. Pauerstein ed. 1987); *see* Rosenfield ¶¶ 10-11 at 681-83A. Similarly, a pregnant woman with diabetes is more likely to develop infections of a greater severity, injure her birth canal during vaginal delivery, require a caesarian section, and hemorrhage after delivery. J. Pritchard, P. MacDonald & N. Gant, *Williams Obstetrics* 600 (17th ed. 1985); *see* J.A. 254-55. Finally, pregnant women with sickle-cell anemia experience more frequent and severe health crises and are more susceptible to pneumonia, urinary tract infections, severe anemia, congestive heart failure, pre-eclampsia, and pulmonary complications such as embolus. *See generally* Rosenfield ¶ 14 at 684A.

cardiac output, and fluid retention that would accompany continued pregnancy. Rosenfield ¶ 10 at 681-82A. If such a woman cannot fully discuss the relationship between her heart condition and her pregnancy with her Title X physician, mere referral to a specialist, *see* Pr., 53 Fed. Reg. 2937, will be insufficient to safeguard adequately her health and to apprise her of the necessity of haste in obtaining treatment. As a consequence, some women may suffer direct physical harm, and nearly all women will lose the trust they have held for their Title X physicians. *See, e.g.*, J.A. 203, 220.

2. The physical and financial separation requirement

In addition, section 59.9 requires a Title X project to be "organized so that it is physically and financially separate" from "prohibited" activities. "Mere bookkeeping separation of Title X funds from other monies is not sufficient." § 59.9. The determination of the "objective integrity and independence" of the Title X project will turn on the "existence of separate accounting records," the physical segregation of "treatment, consultation, examination, and waiting rooms," the "existence of separate personnel," and the absence of "signs and material promoting abortion." § 59.9(a)-(d). The undisputed record below establishes that the organizational and physical restructuring necessary to satisfy these requirements would impose prohibitive costs, *e.g.*, J.A. 156, 165-66, 275; *see generally* 27a, and make it impossible to run multi-service reproductive health programs under a single roof.[20]

3. The abortion advocacy ban

Finally, section 59.10 prohibits activities that "encourage, promote or advocate abortion." The prohibition reaches all

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20 Many Title X clinics, for example, currently provide prenatal delivery and obstetric services with grants under the Maternal and Child Health Services ("MCH") Block Grant, Title V of the Social Security Act, 42 U.S.C. § 701 (1982). With Title V money, clinics provide essential prenatal and obstetric care, including genetic testing and amniocentesis, for low-income mothers. J.A. 173. Because counseling and discussion of abortion appropriately follow adverse test results, clinics will be unable to continue to provide these prenatal services on the same site as their Title X funded services. § 59.9; *see* Bennett ¶ 23 at 501-02A; J.A. 155, 166-67.

activities or information that "assist" a woman in obtaining an abortion or that make the abortion option more "accessib[le]." The ban thus extends to the provision of pamphlets, books, or sex education lectures that touch upon the subject of abortion as an option.

E. The Proceedings Below

Petitioners initiated this action on February 2, 1988 asserting both statutory and constitutional claims. Petitioners in the consolidated case in this Court, *New York v. Sullivan* (No. 89-1392), filed a similar action. On March 1, 1988 the district court granted a preliminary injunction, 427-28A, but on June 30, the court granted summary judgment in favor of the Secretary and dismissed the complaint, 9-32a.

On November 1, 1989, a divided court of appeals affirmed the district court decision. The opinion of the court deferred to the Secretary's unprecedented reinterpretation of the statute and concluded that the regulations did not impermissibly infringe on the fundamental rights of speech or privacy. 53-59a. Both the concurring and dissenting judges were troubled by the regulations which they found to interfere with a patient's informed choice about pregnancy and to create a risk of serious health consequences for women relying on Title X physicians. 61-62a (Cardamone, J., concurring); 65-66a (Kearse, J., dissenting). The dissent further concluded that the regulations discriminate on the basis of viewpoint in violation of the First Amendment, interfere with a woman's Fifth Amendment right to choose whether to have an abortion, and are "arbitrary and capricious." 63-67a. The Second Circuit decision, appealed herein, is alone in upholding the regulations. 41-60a. The First Circuit Court of Appeals and two district courts have struck them down.[21]

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21 *Massachusetts v. Secretary of Health & Human Servs.*, 899 F.2d 53 (1st Cir. 1990) (en banc), *aff'g*, 679 F. Supp. 137 (D. Mass. 1988), *cert. pending*, 58 U.S.L.W. 3834 (U.S. June 26, 1990); *Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465 (D. Colo. 1988) (preliminary injunction), 687 F. Supp. 540 (D. Colo. 1988) (summary judgment), *appeal pending*, No. 88-2251 (10th Cir.) (oral argument held May 11, 1989); *see also West Virginia Ass'n of Community Health Centers, Inc. v. Sullivan*, No. 2:89-0330 (S.D.W. Va. Mar. 1, 1990). Due to the injunctions issued in these cases and by the courts below, 68-69a, the regulations have been blocked throughout much of the nation.

SUMMARY OF ARGUMENT

Through the challenged regulations, the Secretary seeks to transform a statute subsidizing a broad range of comprehensive family planning methods and services into an ideological device for distorting the vital medical information that Title X provides to low-income women. The restrictions the Secretary thus imposes on grantees exceed constitutional constraints on the conditions government may place on its benefits and grants, while defying the language, structure, and history of Title X.

No one has a right to a subsidy for the exercise of rights to speech and privacy, but when the government chooses to provide subsidies, there are some things it may not constitutionally do. First, as this Court has admonished in case after case, government cannot exact adherence to any orthodoxy through the imposition of viewpoint-based conditions on its largesse. Yet the regulations challenged here do just that, imposing upon health professionals and their patients a viewpoint-based regulatory scheme of precisely the sort this Court has previously left no doubt would violate the First Amendment. *See Arkansas Writers' Project, Inc. v Ragland*, 481 U.S. 221, 229-31 (1987); *Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983).

The challenged regulations in fact prohibit all discussion about abortion as a lawful option—including counseling, referral, and the provision of neutral and accurate information about ending a pregnancy—while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term. Whatever the power of government to advance its views, this power is at its lowest ebb when it seeks to control the words spoken and the literature provided by the professional health care staff of the nonprofit private and public health agencies it has chosen to subsidize under Title X. Because they are viewpoint-based and intrude into an historically protected dialogue between doctor and patient,

the regulations violate the First Amendment rights of both speaker and listener in this medical context.

Second, government may not use the leverage of a subsidy to restrict speech underwritten by the recipient's own private funds. *See FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984). Yet these regulations violate this principle as well by restricting speech supported by such non-Title X sources as matching funds, patient fees, and other reimbursements or monies. Moreover, the regulations place severe burdens on expression of both parent organizations and affiliate clinics not funded by Title X: they flatly prohibit the physical consolidation of programs supported with financially segregated funds and cripple the ability of such affiliates to reach their intended audience.

Beyond their First Amendment flaws, the challenged regulations devastate the Fifth Amendment right to medical self-determination and privacy by depriving women, at a critical time of decision, of information potentially crucial to their health, while requiring the rote provision of a kind of government-approved referral that may be medically disastrous for them. Lured into Title X clinics by the apparent promise of reliable health care, indigent women leave the clinic not merely unenlightened but affirmatively misled. The lives and health of women are thus directly jeopardized—not, in this instance, because of poverty, but because of the mandatory misinformation the regulations require.

Finally, the Secretary must, but cannot, demonstrate that Congress explicitly authorized his novel construction of the Title X statute. The plain language, the legislative and administrative history, and the object and policy of Title X as a whole make clear that Congress intended to proscribe abortions, not speech, and to encourage integration of Title X programs into the general health care system. The regulations eviscerate the Title X program and the intent of Congress by subordinating its overarching interest in public health and equality of reproductive choice to the Secretary's ideological aims.

ARGUMENT

I. THE REGULATIONS VIOLATE THE FIRST AMENDMENT RIGHTS OF CLINICS, STAFF, AND PATIENTS THAT ARE SUBSIDIZED IN WHOLE OR IN PART BY TITLE X.

The regulations challenged here violate two well-established limitations on government's prerogative to implement policy choices through a subsidy scheme. First, they inject viewpoint-discriminatory controls on speech into a funded dialogue of particular sensitivity. *See infra* Point IA. Second, they condition receipt of Title X funds on the relinquishment of private freedom of expression. *See infra* Point IB. At stake in this case are the free speech rights of private health care organizations that receive Title X funds, of their staff, and of their patients under these two fundamental principles. Whatever the power of government to speak through its officials, or by earmarking federal funds, when it chooses to subsidize eligible "public or nonprofit private entities," 42 U.S.C. § 300(a) at J.A. 3, to perform a function such as health care, legal assistance, or education—the words of the doctor to her patient, of the lawyer to her client, and of the professor to her public university students, remain most assuredly the speech of private citizens. In accepting Title X funds, neither grantees nor the professionals they employ are transformed from private speakers into the "voice of America."[22]

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22 Little is more fundamental to our constitutional order than the proposition that private individuals are not transformed into government spokespersons because they are funded by the government. *See, e.g., Polk County v. Dodson*, 454 U.S. 312, 318 (1981); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 840-43 (1982); *Blum v. Yaretsky*, 457 U.S. 991, 1008-09 & n.19 (1982). Nor do states, cities, and their agencies become "field offices of the national bureaucracy," *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 777 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part), merely by accepting federal grants.

A. Sections 59.8 and 59.10 Impose Viewpoint-Discriminatory Conditions on Government Subsidies to Private Speakers in Violation of the First Amendment.

Sections 59.8(a)(1) and 59.10 completely proscribe the expression of one viewpoint while section 59.8(a)(2) requires the expression of another. If applied to nonfederally funded organizations, these restrictions would clearly violate the First Amendment's prohibitions on censoring speech[23] and on commanding it. *E.g.*, *Wooley v. Maynard*, 430 U.S. 705, 713 (1977).[24] Moreover, the regulations would unquestionably violate the First Amendment's cardinal prohibition against prior restraints because they require "assurances" in advance that speakers conform their speech to this government-composed script. *See* § 59.7.[25] That these regulations purport to apply solely to the use of federal funds, *but see infra* Point IB, does not lessen their constitutional infirmity.

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23 *E.g.*, *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983) (quoting *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972)); *see also Texas v. Johnson*, 109 S. Ct. 2533, 2544 (1989) (noting that a "bedrock principle underlying the First Amendment . . . is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

24 *See City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 472 n.16 (1983) (O'Connor, J., White, J., Rehnquist, J., dissenting) (stating that statutory provisions requiring physician to provide certain information to woman prior to performing an abortion may "violate the First Amendment rights of the physician if the State requires him or her to communicate its ideology"). *See also Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 830 (1986) (O'Connor, J., Rehnquist, J., dissenting) (same).

25 This Court has long protected against the special dangers posed by such a requirement, *see New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam); *Near v. Minnesota*, 283 U.S. 697, 713-16 (1931); *see also FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 604-07 (1990) (plurality opinion), even when the sole enforcement device used by government is the withholding of a government benefit, *see, e.g.*, *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 769-72 (1988); *Speiser v. Randall*, 357 U.S. 513, 518-20, 528-29 (1958).

1. The regulations impermissibly discriminate on the basis of viewpoint and suppress truthful medical information.

The challenged regulations strike at the heart of what the First Amendment protects. They plainly "prescribe what shall be orthodox" in the dialogue between a Title X health professional and her patient, *see Texas v. Johnson*, 109 S. Ct. at 2546, while proscribing the discussion of "ideas" or information that the Secretary considers "dangerous," *see Cammarano v. United States*, 358 U.S. 498, 513 (1959). Face-to-face with a patient in need, a Title X health professional under these regulations will be compelled to communicate the Secretary's ideological slant against abortion and to selectively excise government-disapproved, but entirely truthful information about abortion from discussions with all pregnant patients and, indeed, from discussions with any patient who asks.

The regulations censor Title X physicians from "counseling concerning the use of abortion," § 59.8(a)(1); encouraging, promoting, or advocating abortion, § 59.10(a); and "assist-[ing] women to obtain abortions or increas[ing] the[ir] availability or accessibility," *id.* Since the provision of nondirective, factual information about abortion—even in response to a patient inquiry—is considered to "otherwise promote," *see* § 59.8(a)(4), or "increase . . . accessibility of abortion," *see* § 59.10(a), all speech about abortion that is either neutral or that casts abortion in a positive light is facially prohibited.[26] Thus, if a woman asks her doctor whether abortion is still legal, whether she will be able to obtain an abortion without parental involvement, or whether abortion is a safe and available option, her Title X health professional will be unable to answer the question. At the same time, the Title X doctor or counselor will be barred from referring the woman to an abortion provider or even to a provider that is likely to

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26 Thus, the prohibition of § 59.8(a)(1) applies to all "counseling *concerning* the use of abortion," (emphasis added), and is not limited to discussions in which a physician feels it necessary to advise her patient to consider abortion due to medical circumstances and thus to "counsel" abortion in a more affirmative sense.

give her the information she seeks, *see* § 59.8(a)(1), (a)(2), and will be unable to offer her materials such as the yellow pages or other informational pamphlets that may assist her, *see* § 59.10(a). But silence about abortion will not be the result. Instead, health professionals are to tell patients who ask that "the project does not consider abortion an appropriate method of family planning," § 59.8(b)(5), and to refer all pregnant women to prenatal care providers that "promote the welfare of . . . [the] unborn child," § 59.8(a)(2), while providing information necessary to protect the health of ". . . [the] unborn child," *id.* Thus, a negative message about abortion will be all that is conveyed.[27]

Although the government may use "carrots" to induce the speech and behavior of its citizenry, it may not use the power of the purse to ensure that private speakers espouse only a

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27 The viewpoint-discriminatory character of the regulations cannot be obscured by reading § 59.8(a)(1) as though it proscribed anti-abortion statements as well. For the regulations require the provision of "information, . . . to protect the . . . unborn child," § 59.8(a)(2), and elsewhere treat "counseling with respect to . . . abortion" as simply one among other means of "promot[ing] abortion . . . ." § 59.8(a)(4). Therefore, the regulations cannot be read as though they prohibited the expression of all opinions pro or con bearing on abortion; their proscription is decidedly one-sided.

In particular, it is untenable to say, as did the Second Circuit, that the regulations may not be deemed facially discriminatory unless their "actual effect" is to fund "[a]rgumentation . . . as to the advisability of an abortion" or to permit "public anti-abortion advocacy." 59a. When one viewpoint is entirely censored, *that* is viewpoint discrimination even if government does not, in the same breath, expressly promote the opposing viewpoint. Moreover, the "actual effect" of these regulations is plainly to eliminate all grantees from the Title X program who believe that abortion is one of several options that must be presented to pregnant women facing an unwanted or medically complicated pregnancy. The Title X "forum" for medical speech will thus be available only to those with one viewpoint. *United States v. Kokinda*, 58 U.S.L.W. 5013, 5016 (U.S. June 26, 1990). Finally, it cannot be disputed that the regulations were intended to advance a single government-approved viewpoint; they were promulgated to promote "right-to-life concerns" by modifying existing guidelines to permit "pro-life counseling centers" to participate in the Title X program. Letter from Representative Christopher H. Smith, *et al.*, to Donald T. Regan (Aug. , 1986) at 98-99a; *see also* Letter from Otis R. Bowen, M.D., to Representative Vin Weber (Aug. 19, 1986) at 99-100a.

government viewpoint. The "greater" power to fund no speech regarding a particular subject, or to earmark federal funds for a chosen purpose, most certainly does not include a "lesser" power to fund a class of nonfederal speakers on the condition that they speak only in favor of government-preferred views. Without this limitation, federal fora and subsidies involving speech—from the fund drive aimed at federal employees to the Medicaid, Medicare, or Veterans' disability programs—could be made available on terms consistent only with those views the federal government wishes to endorse. The law, of course, is otherwise.

This Court has repeatedly stated that government may not "discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.' " *Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983) ("*TWR*") (quoting *Cammarano*, 358 U.S. at 513). Thus, a statute or regulation that merely subsidizes a particular activity presents a "very different question" from one "designed to discourage the expression of particular views." *Id.* at 551 (Blackmun, J., concurring). *See also Cammarano*, 358 U.S. at 513 ("[n]ondiscriminatory denial of [tax] deduction . . . is plainly not 'aimed at the suppression of dangerous ideas' ") (quoting *Speiser*, 357 U.S. at 519).

Consistent with *TWR*'s admonition, this Court held unconstitutional a governmental scheme designed to subsidize some magazines while not subsidizing others. *See Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 234 (1987). In so holding, the majority concluded that the scheme reflected a "disturbing use of selective taxation" because it conditioned a magazine's tax status on its content, a manner of discriminating in subsidies "particularly repugnant to First Amendment principles." *Id.* at 229. Even the dissenters in *Ragland* did not dispute that the Constitution constrains the manner in which the government disburses subsidies, noting that a "stringent" rule would be "appropriate . . . when the subsidy pertains to the expression of a particular viewpoint." *Id.* at 237 (Scalia, J., Rehnquist, J., dissenting). *See FCC v. League of Women Voters*, 468 U.S. 364, 383, 392 (1984); *see also id.* at 407 (Rehnquist, J., dissenting) (finding condition to be constitutional because "[i]n no sense can it be said that

Congress has prohibited only editorial views of one particular ideological bent").

This Court has applied these fundamental principles not only when the subsidy assumes the form of a grant or tax benefit, but also when it takes the shape of a forum to which speakers are granted access. *See Kokinda*, 58 U.S.L.W. at 5016 (reiterating that restrictions on access to or use of even nonpublic fora must be "viewpoint neutral"). Thus, when the government facilitates speech by providing or paying for a forum—be it a public, limited, or nonpublic forum—it may not distinguish between those granted and those denied access on the basis of viewpoint. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985); *see also Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

Because Title X continues to fund speech ancillary to pregnancy testing in a manner that is not evenhanded with respect to views and information about abortion, it invidiously discriminates on the basis of viewpoint. *See Massachusetts v. HHS*, 899 F.2d at 72-75. Together, sections 59.8 and 59.10 favor one side of a political controversy. *Cf. Boos v. Barry*, 485 U.S. 312, 319 (1988) (finding prohibition on pickets outside embassy involving speech critical of foreign government not to be viewpoint-based because it did *not* favor one side of a political controversy).[28] *See also Ragland*, 481 U.S. at 230; *Cornelius*, 473 U.S. at 806; *American Council of the Blind v. Boorstin*, 644 F. Supp. 811, 816 (D.D.C. 1986) (holding elimination of Playboy from magazines to be produced in braille an unconstitutional "viewpoint-based denial of a subsidy").

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28 The regulations at issue are akin to the restriction found unconstitutional in *Schacht v. United States*, 398 U.S. 58, 63 (1970), and characterized by this Court in *Boos* as viewpoint discriminatory. *Boos*, 485 U.S. at 319. In *Schacht*, the Court struck down a statute making it a crime for an actor to wear a military uniform in a play if the production discredited the military. Similarly, in this case, only nonpejorative speech about abortion is prohibited. As the Secretary himself concedes "§ 59.10, like the remainder of the rules [challenged herein], does exhibit a bias in favor of childbirth and against abortion." Pr., 53 Fed. Reg. 2943.

More than simply mandating the inclusion by a physician of medically relevant information, and more still than requiring the inclusion of government's anti-abortion viewpoint, these regulations selectively ban the communication of an entire array of factual information about abortion, even when that information is truthful, neutral, and medically appropriate. *Cf. Edwards v. Aguillard*, 482 U.S. 578, 634 (1987) (Scalia, J., dissenting) (characterizing constitutional prohibition on teaching facts supporting "creation science" as "repressive"). Government suppression of ideas is, of course, antithetical to the First Amendment. *See, e.g., FW/PBS, Inc.*, 110 S. Ct. at 605, 607 (plurality) (invalidating scheme that creates a "risk" of suppressing speech); *Lakewood*, 486 U.S. at 757 (same); *Mosley*, 408 U.S. at 92-98.

Animated by the intent to suppress access to an "idea" that the Secretary believes to be "dangerous," *TWR*, 461 U.S. at 548; *see Cornelius*, 473 U.S. at 806, the regulations strike at the heart of the First Amendment by attempting "to manipulate the choices of . . . citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice." *Central Hudson Gas v. Public Service Comm'n*, 447 U.S. 557, 575 (1980) (Blackmun, J., concurring).[29] Since the regulations cannot be "justified without reference to the content [or viewpoint] of the regulated speech," *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984), *quoted in Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2754 (1989), or without reference to their intent to suppress the "idea" of abortion in the medical choices of low-income women, *see United States*

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29 As this Court stated in *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976):

> There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed and that the best means to that end is to open the channels of communication rather than close them . . . . But the choice among these alternative approaches is not ours to make or the [Secretary's] . . . . It is precisely this choice between the dangers of suppressing information, and the dangers of misuse if it is freely available that the First Amendment makes for us.

Id. at 770.

v. O'Brien, 371 U.S. 367, 377 (1968), they are plainly unconstitutional.[30]

2. Viewpoint-based manipulation of the Title X doctor-patient dialogue is particularly antithetical to the First Amendment.

Whatever the general powe of government to earmark funds or even to control the speech it subsidizes, surely it cannot manipulate the speech of a doctor or counselor with her patient.[31] The hallmark of the doctor-patient relationship is frank and uninhibited dialogue on subjects pertinent to medical conditions and medical choices. Our history and tradition demonstrate unswerving recognition of the sanctity of this dialogue.[32] A physician or counselor who has taken an

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30 One member of this Court recently noted that a restriction on speech in an arguably non-public forum must be

> . . . narrow in its purpose, design, and effect, . . . [must] not discriminate on the basis of content or viewpoint, . . . [and must be] narrowly drawn to serve an important governmental interest . . . .

Kokinda, 58 U.S.L.W. at 5018 (Kennedy, J., concurring in judgment). No such interest has been proffered by the Secretary.

31 As Justice Douglas stated, "The right of the doctor to advise his patients according to his best lights seems so obviously within [the] First Amendment . . . as to need no extended discussion." *Poe v. Ullman*, 367 U.S. 497, 513 (1961) (Douglas, J., dissenting) (dissenting from a ruling on standing).

32 The notion that a physician must be able freely to advise, counsel, and discuss treatment options with a patient can be traced as far back as Plato. In *The Laws*, Plato stated:

> [T]he slave doctor[ ] . . . prescribes what he thinks good, out of the abundance of his experience, as if he had no manner of doubt; and when he has given his orders, like a tyrant, he rushes off . . . . But the other doctor, who is a freeman, attends and practices upon freemen . . . . [H]e enters into discourse with the patient and with his friends, and is at once getting information from the sick man, and also instructing him as far as he is able, and he will not prescribe for him until he has first convinced him . . . . Now, which is the better way of proceeding in a physician and in a trainer?

Plato, *The Laws* 293 (B. Jowett trans. 2d ed. 1875). Tracing the roots of the notion of medical self-determination, this Court recently noted state courts'

oath to an outside authority that precludes candid discussion tailored to the individual circumstances of the patient cannot discharge these well established professional and ethical duties.[33] Regulations that excise all nonpejorative references to abortion from that dialogue do not leave intact the role of the physician as so conceived. Instead, they transform the physician, otherwise free to exercise her professional discretion on a case-by-case basis, into a government bureaucrat without any discretion at all.[34]

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long-standing recognition of the "informed consent" doctrine—a concept that presupposes a free exchange between doctor and patient. *See Cruzan v. Director, Mo. Dep't of Health*, 58 U.S.L.W. 4916, 4917-18 (U.S. June 26, 1990). *See generally* Pernick, *The Patient's Role in Medical Decisionmaking: A Social History of Informed Consent in Medical Therapy*, in United States President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions* app. E (1983). As in the lawyer-client relationship, the confidential nature of the doctor-patient dialogue has also been long protected. *See Trammel v. United States*, 445 U.S. 40, 51 (1980) (discussing doctor-patient and lawyer-client testimonial privileges and noting they are "rooted in the imperative need for confidence and trust").

33 The professional standards of the American Medical Association ("AMA"), J.A. 79-81, and the American College of Obstetricians & Gynecologists ("ACOG"), J.A. 76-78, require doctors to provide full, unbiased information about and referral for all medical alternatives, *see generally* 80-82a; 78-80a, even for those treatment options they are unwilling or unable to provide, *see* 84a; Cohen ¶ 3 at 509-10A. Where not medically contraindicated, the physician's duty to communicate honestly and accurately with a patient dates back to the first AMA Code of Medical Ethics. *See* J. Bell, Introduction to *Proceedings of the National Medical Conventions, held in New York, May, 1846, and in Philadelphia, May, 1847* 88 (1847) (regarding creation of the first Code of Medical Ethics) ("Veracity . . . is a jewel of inestimable value in medical description and narrative . . . which ought never to be tainted for a moment, by even the breath of suspicion.").

34 Indeed, the regulations impose a particularly severe chill on the exercise of medical discretion because the fuzziness of the lines they draw will induce self-censorship of the worst kind. *See Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). For example, § 59.8(a)(4) allows for "the provision of information to a project client which is medically necessary to assess the risks and benefits of different methods of contraception . . . *provided*, that the provision of this information does not include counseling with respect to or otherwise promote abortion as a method of family planning." (emphasis in original). How is a physician to know in advance whether giving a woman

A woman who comes to a doctor working in an institution that receives Title X funds, like all patients, believes that her doctor will give her full information about her legally available and medically appropriate options. She is neither told, nor can she typically afford, to seek a second opinion. In this context it is wholly unrealistic to treat the regulations as mandating one-sided speech that will be countered by speech on the other side in the private marketplace. Indeed, as this Court recognized in *Virginia Citizens Consumer Council*, those whom the suppression of health information "hits the hardest are the poor . . . [who] are [among] the least able to learn, by shopping from . . . [clinic to clinic], where their scarce dollars are best spent" or which doctor they should trust. 425 U.S. at 763. For the five million women seen annually in Title X clinics, the Secretary's chosen means of enforcing orthodoxy is indistinguishable from that which would result from an across-the-board criminal or regulatory ban on abortion counseling and referral. Government imposed distortion of the Title X doctor-patient dialogue severely infringes the woman's right to receive unbiased medical information. *See Lamont v. Postmaster General of the United States*, 381 U.S. 301, 307 (1965); *see also Virginia Citizens Consumer Council*, 425 U.S. at 756-57.[35]

The Title X health professional stands in the position of fiduciary to her patients.[36] Lacking equality in information and knowledge, the patient trusts and relies on the physi-

information about abortion, to be weighed in conjunction with contraceptive choice, will subsequently be considered by the Secretary to have promoted or encouraged abortion? A chill on medical speech resulting from such ambiguities is inevitable.

35 Even if Title X patients could obtain full and fair information elsewhere, this Court has never recognized a "general principle that freedom of speech may be abridged when the speaker's listener could [, theoretically,] come by his message by some other means." *Virginia Citizens Consumer Council*, 425 U.S. at 757 n.15, *quoted in Ragland*, 481 U.S. at 231; *see also TWR*, 461 U.S. at 553.

36 A fiduciary relationship "exists when there is a reposing of faith, confidence and trust, and the placing of reliance by one upon the judgment of the another." *Black's Law Dictionary* 564 (5th ed. 1979).

cian's judgment and information.[37] J.A. 207, 219; 88a. Quite often there is no other source of critical health care information, *e.g.*, J.A. 144-45, 244-45; *see Griswold v. Connecticut*, 381 U.S. 475, 503 (1965) (White, J., concurring), and the patient's reliance on the Title X program borders on "captivity." *See generally Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (characterizing as captive those present as a matter of necessity rather than choice). While the government "clearly has a right to express [its] views to those who wish to listen, [it] has no right to force [a particular] message upon an audience incapable of declining to receive it." *Id.* at 307 (Douglas, J., concurring).

The regulations are "[c]raft[ed] . . . in [a] fashion [that] constitutes a trap for the mostly unsophisticated and unwary patients" at a Title X clinic. 61a (Cardamone, J., concurring). "Captive," and trusting in a fiduciary who unbeknownst to her is not free to act as an advisor in her best interests, the Title X patient is susceptible to being misled and unable to filter out the distortion that the government imposes on her doctor's advice. Because it is conveyed in confidence by a fiduciary, the misinformation she receives will be imbued with exaggerated though unwarranted reliability.[38] Sections 59.8 and 59.10 thus serve as a devastatingly effective means of suppressing the idea of abortion, as well as information about its safe and lawful availability, in the minds of low-income women served by the Title X program. The government is not simply adding information to the "marketplace of ideas." Rather, because the Title X program is often the only "marketplace" in which low-income women

37 This reliance and inequality of knowledge underlie the legal imperatives governing the doctor-patient dialogue. Doctors in New York, as in a majority of states, *see* Exhibit B, risk liability for failure to provide patients with complete information as to their medical options. *E.g.*, J.A. 174, 241; *see also* N.Y. Pub. Health Law § 2805-d (McKinney Supp. 1989).

38 Recognition of the potential for undue influence in such a context has, for example, prompted this Court to uphold restrictions on in-person solicitation of clients by attorneys, while striking restrictions on comparable solicitation in other contexts. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 641-42 (1985); *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457-58 (1978).

can obtain medical counsel and information, sections 59.8 and 59.10 impermissibly skew a source of information that government has itself monopolized.[39]

B. The Regulations Violate the First Amendment by Penalizing Speech Funded with Non-Title X Monies.

This Court has "long[ ]rejected [the] fallacy that a privilege may be burdened by unconstitutional conditions." *Rutan v. Republican Party*, 58 U.S.L.W. 4872, 4879 (U.S. June 19, 1990) (Stevens, J., concurring); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (government "may not deny a benefit . . . on a basis that infringes . . . constitutionally protected interests—especially, [the] interest in freedom of speech"). In *FCC v. League of Women Voters*, 468 U.S. 364 (1984), this Court held that speech-restrictive conditions on a public benefit that infringed upon a recipient's ability to engage in the prohibited speech activity "using even wholly private funds" constituted just such an unconstitutional condition.[40] *Id.* at 399-401. The challenged regulations violate this principle in several independent, but equally damaging ways.[41]

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39 Commentators have long noted the need to distinguish between government expression that simply adds to and that which approaches monopolization of the marketplace of ideas. *E.g.*, T. Emerson, *The System of Freedom of Expression* 698 (1970) (characterizing the state of affairs when "the functions or powers of government may give it a monopoly or near monopoly over expression" as "the antithesis of a system of free expression"); *see also Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3052 & n.8 (1989); *Student Gov't Ass'n v. Board of Trustees*, 868 F.2d 473, 479 n.4 (1st Cir. 1989).

40 The state cannot, consistent with the Constitution, condition tax exemptions, *Speiser*, 357 U.S. at 518-19, unemployment benefits, *Frazee v. Illinois Dep't of Employment Sec.*, 109 S. Ct. 1514, 1516-18 (1989), or even public employment, *Rankin v. McPherson*, 483 U.S. 378, 390-92 (1987), on the relinquishment of First Amendment freedoms. *See also Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1408 (1990) (Scalia, J., dissenting) ("It is rudimentary that the State cannot exact as the price of . . . special advantages the forfeiture of First Amendment rights.").

41 It would be inappropriate for this Court to sever any regulatory provisions found to be invalid from those found to be permissible unless it is clear that to do so would be consistent with the Secretary's intent and would

1. Sections 59.8 and 59.10 restrict speech funded by non-Title X sources.

On their face, the challenged regulations expressly require Title X recipients to spend non-Title X funds to provide incomplete and biased medical information. This is so because sections 59.8 and 59.10 restrict speech throughout the "Title X program" or "project" defined to include all plans, activities, and resources under a single administrative umbrella funded in any part by Title X. § 59.2.[42] The regulations specifically subject "grant funds, grant-related income or matching funds" to the restrictions on speech in sections 59.8 and 59.10. *Id.* The Secretary does not dispute that the challenged regulations govern these non-Title X monies, Brief for the Respondent at 6 n.6, *Rust v. Sullivan* and *New York v. Sullivan* (Nos. 89-1391, 1392) ("*Respondent's Brief on Certiorari*"), nor does the Secretary dispute that grant-related income includes all "patient charges or reimbursement from collateral sources."[43] *Id.* However, section 59.2 defines "Title

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leave the permissible provisions "fully operative" standing alone. *Alaska Airlines v. Brock*, 480 U.S. 678, 684 (1987) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976)); *see also Thornburgh*, 476 U.S. at 764-65. Sections 59.8, 59.9, and 59.10 all apply to the Title X project or program as defined in § 59.2; § 59.7 requires assurances of compliance with §§ 59.8 through 59.10, and § 59.9 requires separation from that which is prohibited in §§ 59.8 and 59.10. The regulations were designed collectively to set "standards for compliance" with § 1008, Pr., 53 Fed. Reg. 2922, as evidenced not only by statements of their singular purpose, *id.* at 2925, but also by the omission of a severability clause. *See Massachusetts v. HHS*, 899 F.2d at 76. The regulations are thus too intertwined to permit the Court to invalidate any single provision without rewriting the whole—a power it lacks. *See, e.g., Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986).

42 "Program" and "project" are defined "interchangeably and mean a coherent assembly of plans, activities and supporting resources contained within an administrative framework." § 59.2. "Title X program" or "project" is defined as "the identified program which is approved by the Secretary for support." *Id.*

43 Patients whose income is between 100% and 250% of the federal poverty line are required to pay a fee for services along a scale of scheduled discounts; patients with income above 250% are charged a fee "designed to recover the reasonable cost of providing services." §§ 59.5(a)(7), 59.2. The

X project funds" to "includ[e] but not [be] limited to" these sources of non-Title X funds. Thus "*all* funds allocated to the Title X program" are swept within the scope of the restrictions set forth in sections 59.8 and 59.10. § 59.2 (emphasis added).[44]

Although the Secretary claims that section 59.10 applies only to the use of Title X project funds, *see Respondent's Brief on Certiorari* at 6, the section is not so limited. A Title X program cannot even make available to its patients textbooks describing the abortion procedure, pamphlets discussing the availability of abortion at wholly distinct entities, or the yellow pages—though written, produced, and placed within the Title X program entirely without the expenditure of even a single Title X dollar. These materials must be purged from the waiting rooms, treatment rooms, and resource centers of Title X facilities because they will "increase the availability or accessibility of [the] abortion" option. § 59.10; *see also* 61a (Cardamone, J., concurring) (finding regulations bar "use" of yellow pages "as a reference source for Title X patients"); 64-65a (Kearse, J., dissenting) (same).

On its face, section 59.9 affords no option for continuing prohibited speech about abortion with non-Title X monies swept within the definition of "Title X project funds." Instead, section 59.9 permits grantees to engage in prohibited speech when separate from the "Title X project." Section 59.9 makes no provision for continued speech about abortion with non-Title X grant dollars that are defined to be *within* the Title X project. Because the regulations thus condition the Title X grant on the unavoidable relinquishment of speech about abortion funded by those non-Title X sources

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income derived from such visit fees alone constitutes as much as 23% of the revenues of some plaintiffs' family planning programs. FY 1989 Grant Thornton Audit Report MHRA (June 30, 1989) (submitted to HHS, Region II) (percent of revenue attributable to patient fees of the family planning program of PPNYC in the South Bronx).

44 Many clinics allocate substantial non-Title X resources to their Title X family planning programs in order to expand the number of patients reached and served. *See supra* note 5.

that are within the Title X project, they violate the First Amendment. *See FCC*, 468 U.S. at 399-401.[45]

2. Section 59.9 subjects Title X recipients to impermissible burdens on speech funded by non-Title X sources.

In addition, section 59.9 severely impairs and may render physically impossible the effort of Title X grantees to engage in protected speech by consolidating programs supported with financially segregated funds. Most Title X recipients also receive funds from a multitude of other governmental and private sources. *E.g.*, J.A. 161, 234. Section 59.9 will cast asunder the delicate financial balance of the nonprofit and public entities participating in the Title X program.[46] This is so because programs funded by non-Title X sources that necessarily include the speech prohibited by sections 59.8 and 59.10 must be run in physically separate locations to comply with section 59.9.[47]

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45 Statutes conditioning the award of state funds on cessation of abortion counseling, even with private funds, have consistently been held to condition benefits impermissibly on the relinquishment of constitutional rights. *Planned Parenthood v. Arizona*, 718 F.2d 938, 944-46 (9th Cir. 1983), *appeal after remand*, 789 F.2d 1348 (9th Cir.), *aff'd sub nom. Babbitt v. Planned Parenthood*, 479 U.S. 925 (1986); *Valley Family Planning v. North Dakota*, 489 F. Supp. 238, 242-43 (D.N.D. 1980), *aff'd on other grounds*, 661 F.2d 99 (8th Cir. 1981); *see Planned Parenthood Ass'n v. Kempiners*, 531 F. Supp. 320, 324-25 (N.D. Ill. 1981), *vacated and remanded on other grounds*, 700 F.2d 1115 (7th Cir. 1983); *see also Massachusetts v. HHS*, 899 F.2d at 73-74.

46 As of April 1, 1981, 63% of Title X grantees were nonprofit, nongovernmental agencies. General Accounting Office, *Restrictions On Abortion And Lobbying Activities In Family Planning Programs Need Clarification* (Sept. 24, 1982) ("*GAO Report*") at J.A. 94. Title X grants are not even available to "for profit" private health care providers. 42 U.S.C. § 300(a) at J.A. 3.

47 Services and speech funded by non-Title X sources frequently include options counseling. For example, a woman having amniocentesis, funded by Title V, Maternal and Child Health Services Block Grant, Title V of the Social Security Act, 42 U.S.C. § 701 (1982), ordinarily will be provided with information on *all* pregnancy options in the event of an adverse test result. J.A. 204; *see* J.A. 166-67. Similarly, a woman at high risk of

The inability of grantees to consolidate programs supported by financially segregated funds in order to facilitate the provision of health services and information to low-income women "dilutes" effective expression, *see Buckley*, 424 U.S. at 65-66, and violates the First Amendment, *see Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 294-99 (1981).[48] "To say that . . . collective action in pooling . . . resources to amplify . . . voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means . . . ." *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 495 (1985); *see also, e.g., United Transp. Union v. State Bar*, 401 U.S. 576, 580 (1971) (right to unite to speak "effectively and economically"); *NAACP v. Button*, 371 U.S. 415 (1963). This Court has never hinted that a prohibition on pooling financially segregated funds can be made a condition of a government subsidy.[49]

Title X clinics are both free-standing and hospital-based.[50] In either setting, Title X patients and those seeking services outside the scope of the Title X program generally walk in

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AIDS seen at a family planning program subsidized by the New York State Department of Health who is planning to become or who is already pregnant must be advised "of the implications of seropositivity for both mother and child" and "made aware of all options." *See* Ex. F to Complaint, *Rust v. Bowen* (No. 88-702) (HIV Guidelines for Subsidized Family Planning Clinics); *see also* J.A. 175.

48 For example, clinics that comply with § 59.9 will be constrained in their ability to implement an innovative and respected health care philosophy favoring the integration of family planning, prenatal, adoption, and abortion services into a single coordinated program. This philosophy, for which several Title X recipients are well-known, *see, e.g.*, J.A. 278, Bennett ¶ 24 at 502A, has proven to be especially effective for teenagers, who frequently do not pursue referrals. J.A. 219-21, 279-80.

49 This Court has neither upheld nor sanctioned a requirement of separation going beyond financial segregation of accounts. *See, e.g., TWR*, 461 U.S. at 544 & n.6; *FCC*, 468 U.S. at 400.

50 For example, in New York, 4 of the 41 Title X delegates are hospitals, 4 are health departments, and 33 others are private agencies. Gesche (Ex. A) (Listing New York State Delegate Agencies) at 555-56A; J.A. 160-61 (listing MHRA delegates).

the same doorway, see the same receptionist, and may share the same waiting room. Overhead, administrative, and personnel costs unrelated to programmatic activities are generally shared, even where funds are financially segregated. The undisputed record below makes clear that at least 50% of Title X clinics lack the resources to duplicate and sustain waiting rooms, treatment rooms, equipment, and staff—ranging from their executive director to their doctors and counselors—entirely distinct from those of the Title X program.[51] *See* 27a; *see also Massachusetts v. HHS*, 899 F.2d at 59-60.[52] Moreover, it would be grossly inefficient and wasteful to do so.[53]

Those clinics that find physical separation impossible to finance will have to cease all speech about abortion in order to continue to receive Title X funds. These grant recipients are akin to the broadcasting station in *FCC* and to the plaintiff in *Frazee*—forced to choose between a government benefit and a fundamental right. Even for those grantees that are able to comply with section 59.9, the burdens imposed are onerous and thus comparable to those found unconstitutional

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51 Eight of 16 affiants below stated that they could not afford to comply with the separation requirement. J.A. 156, 165-67, 275; Bennett ¶¶ 23-25 at 501-03A; Pasternack ¶ 14 at 674-75A; Potteiger ¶ 21 (Dec. 15, 1987); Klepper ¶ 30 (Feb. 5, 1988); Stein ¶ 11 (Feb. 7, 1988). These clinics, along with the entire not-for-profit sector, have long and justifiably relied on the permissibility of pooling resources to meet costs unrelated to the substance of the funded programs. Although § 59.9 indicates that the Secretary will consider factors such as the degree of separation of the Title X project from "treatment, consultation, examination, and waiting rooms[ ] in which prohibited activities [and speech] occur" and "the existence of separate personnel," nowhere does the section specifically include as a "fact[ ] or circumstance[ ]" to be considered the burden imposed on the grant recipient. § 59.9.

52 The ability of Title X grant recipients to satisfy the conditions of § 59.9 will also be limited by their inability to use non-Title X monies, treated by § 59.2 as "Title X project funds," to allay the costs of separation. *See generally supra* Point IB(1).

53 Although these duplicative costs will continue indefinitely, HHS offers clinics the possibility of using grant funds for the "one-time costs associated with relocating a Title X clinic . . . ." Pr., 53 Fed. Reg. 2941. A one-time grant enhancement does not alleviate the costs of ongoing duplication.

in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 252, 255 (1986) (plurality opinion); *see also Austin*, 110 S. Ct. at 1423 (Kennedy, J., dissenting). These burdens are gratuitous and wholly unrelated to the government's only legitimate interest—to ensure that *its* dollars are not expended on the speech prohibited with the government grant.[54]

3. Sections 59.8 and 59.9, in tandem, impermissibly obstruct effective expression funded by non-Title X sources.

The regulations impermissibly burden the speech of those organizations that can afford to create and sustain the separate affiliate required by section 59.9 by impeding the ability of the non-Title X affiliate and of the parent organization to communicate views and information to their target audience. Once the Title X project is separated from a non-Title X affiliate, staff at the Title X clinic will not be able to advise a woman of the availability of services at its own affiliate, but must instead refer her to other programs in the community.[55] Women will thus enter—and leave—the Title X clinic either unaware of the affiliate or uninformed about the distinctions between the services and information available at the Title X

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54 There is no showing that physical separation is necessary to prevent government funding of speech about abortion. *See generally Massachusetts v. Bowen*, 679 F. Supp. 137, 142 (D. Mass. 1988) (summarizing evidence showing no need for physical separation), *aff'd, Massachusetts v. HHS*, 899 F.2d at 74-75 & n.13 (finding physical separation requirement not necessary to ensure that government funds were not spent for purpose outside scope of program); *see also* 66a (Kearse, J., dissenting) (citing to *GAO Report*); *cf. Planned Parenthood v. Arizona*, 789 F.2d at 1351 (finding no showing that monitoring of state funds was impossible and thus holding unconstitutional statutory prohibition against funding organizations providing abortions).

55 Section 59.8(a)(3) prohibits inclusion on the mandatory referral list of non-Title X affiliates that provide abortions. *See supra* Statement of the Case. Moreover, even if the non-Title X affiliate can be included on the referral list, any effort by a Title X subsidized health care provider to refer a patient specifically to the affiliate would violate § 59.8(a)(3)'s prohibition against "'steering' clients to providers who offer abortion as a method of family planning" and its prohibition against referrals that may be considered a "means of encouraging or promoting abortion." *Id.*

clinic and its non-Title X affiliate a few blocks or even floors away.

In so doing, the regulations will deflect and deplete the audience of the non-Title X affiliate because the Title X program will attract women in the vicinity to its services and redirect them from the non-Title X services.[56] In this way, the speech of both private affiliate and parent organization is abridged. "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them." *Lamont*, 381 U.S. at 308 (Brennan, J., concurring). First Amendment rights of one individual, like the non-Title X affiliate here, may be infringed by direct restrictions imposed on its listeners, *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974), or upon those with whom it wishes to associate, *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), *quoted in Healy v. James*, 408 U.S. 169, 183 (1972). The fact that a speaker can speak to someone who has not been thus limited is no answer, for communication is generally directed at a particular audience. *Healy*, 408 U.S. at 176, 181-83 (infringement on right to reach particular audience not ameliorated by ability to reach different audience). The Title X affiliate, as well as the parent organization, thus faces "insurmountable" barriers to the exchange of information with the very audience they most need to reach. *See TWR*, 461 U.S. at 553 (Blackmun, J., concurring); *see also Austin*, 110 S. Ct. at 1409 n.* (Scalia, J., dissenting).

II. THE REGULATIONS VIOLATE THE FIFTH AMENDMENT BY OBSTRUCTING A WOMAN'S DECISION-MAKING ABOUT HER PREGNANCY AND BY INJURING HER HEALTH.

Prompt, accurate information is essential to all medical choices. Mandatory distortion of relevant medical informa-

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56 In addition, a woman denied information about her options at the Title X affiliate may be deterred by the unresponsiveness of the health care providers from ever seeking the services of its non-Title X program. *E.g.*, J.A. 280. Moreover, should she subsequently learn of the affiliate, the Title X patient may be unable to seek its services, for she may no longer have the financial resources to pay for the affiliate services, having expended them at the Title X program. *Massachusetts v. HHS*, 899 F.2d at 70.

tion and a prohibition against individualized referral destroy a patient's capacity to obtain timely medical care and, in many instances, impose real physical harm for which a physician may be liable.[57]

This Court has repeatedly and recently underscored the importance of medical self-determination to an individual's constitutional guarantee of liberty. *Cruzan v. Director, Mo. Dep't of Health*, 58 U.S.L.W. 4916, 4920 (U.S. June 26, 1990); *Washington v. Harper*, 110 S. Ct. 1028, 1036 (1990). In so holding, this Court has recognized that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person . . . ." *Union Pacific Ry. v. Botsford*, 141 U.S. 250, 251 (1891), *quoted in Cruzan*, 58 U.S.L.W. at 4917. Integral to this right is the ability to make an informed and voluntary choice as to the proper course of treatment. *See Cruzan*, 58 U.S.L.W. at 4917-20 (and cases cited therein).[58] This interest in self-determination is at the

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57 Under the law of a number of states, health care providers may be liable for injury resulting from failure to refer a patient or for the consequences of an inadequate or inappropriate referral. 70 C.J.S. *Physicians and Surgeons* §§ 69, 74 (1987). For example, a physician may be held liable for failure to refer a patient to a specialist when " 'the physician knows, or should know, that he does not possess the requisite skill, knowledge or facilities to properly treat a patient's ailment.' " *See Dewes v. Indian Health Serv.*, 504 F. Supp. 203, 208 (D.S.D. 1980) (citation omitted). A physician who makes a medically inappropriate referral "can be held negligent for referring a patient he knows to be in need of a particular type of care to a physician who cannot provide it." *Rise v. United States*, 630 F.2d 1068, 1072 (5th Cir. 1980). Delay in making the referral may also constitute malpractice. *Erickson v. Waller*, 116 Ariz. 476, 479, 569 P.2d 1374, 1377 (Ct. App. 1977). The referring physician who has not treated the patient may still be subject to "a duty to disclose . . . all material information which would enable [the patient] to make an informed decision whether to see the specialist or not." *Moore v. Preventative Medicine Medical Group*, 178 Cal. App. 3d 728, 738, 223 Cal. Rptr. 859, 863 (Ct. App. 1986).

58 As this Court acknowledged in *Cruzan*, the doctrine of informed consent is rooted in our legal history and tradition. 58 U.S.L.W. at 4918 (principle of informed consent "has become firmly entrenched in American tort law"); *id.* at 4922 (O'Connor, J., concurring) (emphasizing that self-determination is "inextricably entwined" with "our notions of liberty"). Indeed, 30 states and the District of Columbia have held that physicians

heart of the right of reproductive choice. *See Roe v. Wade*, 410 U.S. 113, 153 (1973). As this Court has previously recognized, reproductive "decisions are . . . more basic to individual dignity and autonomy" than nearly any other. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986).[59] In reproductive medical decisions, as in all others, the ability to rely on the physician's advice, exercised according to the patient's best interests, is a critical component of medical liberty.[60]

Whether viewed as "fundamental" or as an aspect of "liberty" protected by the Fifth and Fourteenth Amendments, this right to self-determination and to make informed medical decisions free of government-imposed harm is hardly left "unfettered" by these regulations. *See Harris v. McRae*, 448 U.S. 297, 328 (1980) (White, J., concurring). Instead, the regulations positively distort the decisionmaking that follows

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may be liable for failure to disclose alternative treatment or other information material to a patient's ability to make informed medical decisions. Exhibit B.

59 The challenged regulations impose upon Title X health professionals an even tighter "straitjacket" than that struck down in *Thornburgh* and *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983). In those cases, this Court rejected government efforts "to wedge [its] . . . message discouraging abortion into the privacy of the informed-consent dialogue." *Thornburgh*, 476 U.S. at 762; *see also Akron*, 462 U.S. at 443-44. Nothing in the statutes at issue in these cases prohibited the physician from specifically providing information about the availability of abortion or advising the woman of the limitations of the information required by the State. In this case, however, the health provider's speech is not only compelled, but also censored.

60 As early as 1973, in *Doe v. Bolton*, this Court noted that the interests of the woman seeking medical advice about a pregnancy are best served by "allow[ing] the attending physician the room he needs to make his best medical judgment." 410 U.S. 179, 192 (1973); *see, e.g., Colautti v. Franklin*, 439 U.S. 379, 396-97 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52, 64 (1976). Last term this Court reaffirmed this principle. *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3055 (1989) (viability testing requirement applies only if tests would be "useful" and consistent with "professional skill and judgment"); *id.* at 3061-62 (O'Connor, J., concurring in judgment) (testing requirement constitutional, in part because it applies only where "useful" and "when not imprudent").

the diagnosis of pregnancy and directly impose real and, at times, severe medical risks on women making reproductive choices.

A woman diagnosed at a Title X program as pregnant must be referred only for prenatal care. As a consequence, pregnant women are not left in the same position as if the government had funded no Title X program at all. Some Title X patients, particularly those who are unaware of the option of legal, safe abortion,[61] will be led to believe that childbirth is their only alternative, J.A. 154, 284-85, or that abortion is neither appropriate nor medically indicated in their case, J.A. 285-86, J.A. 228-29. For example, a woman who becomes pregnant with an IUD in place needs timely medical advice that removal of the IUD is imperative and that an abortion should be promptly considered because delay could cause sepsis and death.[62] *See also supra* text at 8-9. Generally, women will be delayed by government-mandated inappropriate referrals and will face an increase in the risk of mortality and morbidity associated with abortion.[63] J.A. 227-29. An automatic referral for prenatal care is, thus, an affirmative, deliberate obstruction that both eliminates this vital information and directly imperils women's health.[64]

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61 One study exploring why women delayed in obtaining abortions indicated that five percent of the women did not know they could get an abortion. Torres & Forrest, *Why Do Women Have Abortions?*, 20 Fam. Plan. Persp. 169, 174 (1988).

62 S. Romney, M.J. Gray, A. Little, J. Merrill, E. Quilligan & R. Stander, *Gynecology and Obstetrics: The Health Care of Women* 834 (1981); J. Pritchard, P. MacDonald & N. Gant, *Williams Obstetrics* 822-23 (17th ed. 1985); *see also* J.A. 263-64; *see generally* Rosenfield ¶¶ 8-18 at 680-86A (discussing medical indications).

63 *E.g.*, Cates, *Adolescent Abortions in the United States*, 1 J. of Adolescent Health Care 18, 20 (1980) (delay is greatest cause of increase in risk). Despite the increase in risk associated with delay in abortion, at no time in pregnancy is abortion more risky than childbirth. *See* Tietze & Henshaw, *Induced Abortions: A World Review 1986* 4, 110-11 (Alan Guttmacher Institute 1986).

64 Some of these women, but for the presence of the Title X clinic in their community, would have sought and received diagnosis and complete

Although the government need not "enter or remain in the business of performing abortions," *see Webster*, 109 S. Ct. at 3052, it may not dispense subsidies it has chosen to provide in a manner that "places obstacles in the path of a woman's exercise of her freedom of choice," *McRae*, 448 U.S. at 316; *see Maher v. Roe*, 432 U.S. 464, 470, 473-74 (1977), and it may not "attempt to persuade by inflicting harm on the listener [for this] is an unacceptable means of conveying a message" favoring childbirth, "that is otherwise legitimate." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 715 (1977) (Stevens, J., concurring).[65]

The Second Circuit concluded that because the regulations are a condition on a subsidy, they do not constitute an "affirmative legal obstacle," despite the fact that they "hamper or impede women in exercising their right of privacy." 55a. If this were so, then no condition on a government subsidy could violate the Fifth Amendment even if the condition imposed real harm on patients who depend on government subsidies for medical care.[66] Thus, although the government has an interest in conserving medical resources, a requirement that doctors not even *tell* older kidney patients subsidized by Medicare about the availability of a limited supply of life-

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information about their treatment alternatives elsewhere. Fee-paying patients who obtain a pregnancy test in a Title X clinic may expend their available funds on misleading information when they might have obtained full information elsewhere. *See Massachusetts v. HHS*, 899 F.2d 53, 70 (1st Cir. 1990) (en banc).

65 In *Maher*, *McRae*, and *Webster*, upon which the court of appeals relied, 53-56a, this Court emphasized that "[t]he Government does not seek to interfere with . . . the choice of any woman to have an abortion. The woman's choice remains unfettered . . . ." *McRae*, 448 U.S. at 328 (White, J., concurring). *See also Webster*, 109 S. Ct. at 3052 (refusal to make public hospitals available for abortions left indigent woman with same range of choice as if there had there been no public hospitals); *Maher*, 432 U.S. at 473-74 (1977) (refusal to subsidize did not interfere with decision whether to terminate pregnancy); *see also Akron*, 462 U.S. at 444 n.33.

66 In 1986, over 90% of physicians reported treating patients whose principal source of coverage was Medicare. American Medical Association Center for Health Policy Research, *Socioeconomic Characteristics of Medical Practice, 1987* 11 (1987).

extending kidney dialysis machines would directly impose harm on the patient and would thereby raise constitutional liberty concerns. The patient's death or reduced life span stems, in such an instance, from government-imposed misinformation—not from poverty.[67]

Because these regulations manipulate the doctor-patient dialogue so as to require the provision of misinformation, "the Secretary's policy does not merely fail to remove obstacles to abortions—it creates obstacles." *Massachusetts v. HHS*, 899 F.2d at 69, 70.[68] The regulations distort the decisionmaking process of every woman diagnosed as pregnant at a Title X clinic—those who could have gone elsewhere as well as those who have nowhere else to go. Indiscriminately, they subject all women to health risks that are a direct consequence of the mandated provision of misinformation. Under any standard of review, these regulations impermissibly interfere with the Fifth Amendment rights of women seeking medical care at Title X clinics.

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67 In upholding the constitutionality of the regulations, the Second Circuit reasoned that if the government can constitutionally prohibit abortion services in all public facilities, *see, e.g., Webster*, 109 S. Ct. at 3052, it can prohibit public funds from being used to speak about abortion, as the former "seems . . . a prohibition substantially greater in impact . . . ." 55a. However, the "greater" power to deny reimbursement for or access to abortions does not include the power to distort information integral to a decision whether to seek those services. To the contrary, this "lesser power" has the greater and unique effect of interfering with a woman's decisionmaking process even after she leaves the Title X subsidized clinic.

68 *West Virginia Ass'n of Community Health Centers, Inc. v. Sullivan*, No. 2:89-0330, slip op. at 40-42 (S.D.W. Va. Mar. 1, 1990). *See also Reproductive Health Servs. v. Webster*, 851 F.2d 1071, 1080 (8th Cir. 1988), *rev'd on other grounds*, 109 S. Ct. 3040 (1989); *Planned Parenthood Ass'n v. Kempiners*, 531 F. Supp. 320, 329 (N.D. Ill. 1981), *vacated and remanded on other grounds*, 700 F.2d 1115 (7th Cir. 1983).

III. INASMUCH AS THE CHALLENGED REGULATIONS RAISE SERIOUS CONSTITUTIONAL CONCERNS, THEY MUST BE REJECTED BY THIS COURT BECAUSE THEY ARE NEITHER REQUIRED NOR EXPRESSLY AUTHORIZED BY THE LANGUAGE, STRUCTURE, OR HISTORY OF TITLE X.

An agency construction of a statute that raises grave constitutional concerns must be rejected unless clearly authorized by Congress. At a minimum, the language, structure, and history of Title X do not reveal the requisite clear intent to support the Secretary's construction; indeed, petitioners submit that the agency's new construction is contrary to the statute's language and intent. The Secretary's effort to stretch statutory terms beyond their ordinary meaning so as to authorize encroachment on protected speech is, therefore, impermissible.

A. Where an Agency's Construction of a Statute Raises Serious Constitutional Concerns, It Must Be Expressly Required or Endorsed by Congress.

Where scrutiny of the language, structure, and history of a statute fails to reveal a precise congressional intention contrary to the challenged agency action, this Court would ordinarily defer to a reasonable agency construction within the scope of agency expertise, *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 844 (1984), so long as that construction is consistent with the statute, *Public Employees Retirement Sys. v. Betts*, 109 S. Ct. 2854, 2863 (1989); *see Etsi Pipeline Project v. Missouri*, 484 U.S. 495, 516-17 (1988), and not arbitrary or capricious, *Marsh v. Oregon Natural Resources Council*, 109 S. Ct. 1851, 1860-61 (1989). In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council*, however, this Court restated a recognized exception to this general rule:

> Another rule of statutory construction, however, is pertinent here: where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.

485 U.S. 568, 575 (1988); *see also NLRB v. Catholic Bishop*, 440 U.S. 490, 500-01 (1979); *Kent v. Dulles*, 357 U.S. 116, 127-30 (1958). Nor is it necessary for this Court to decide conclusively whether the challenged regulations are constitutional because even "substantial . . . constitutional doubts . . . warrant the employment of [this] canon of statutory construction." *United States v. Security Indus. Bank*, 459 U.S. 70, 74 (1982); *see Catholic Bishop*, 440 U.S. at 501 (Court makes "narrow inquiry whether the [agency action] presents a significant risk" of unconstitutionality); *Kent*, 357 U.S. at 129-30. *See generally Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3060 (1989) (O'Connor, J., concurring in judgment) (avoidance of constitutional questions is a "venerable principle").

It cannot be disputed that the Secretary's construction of section 1008 raises serious constitutional questions.[69] This Court must, therefore, "independently inquire" whether an alternative interpretation exists that can fairly be ascribed to the statute and that would avoid serious constitutional concerns. *DeBartolo*, 485 U.S. at 577; *Kent*, 357 U.S. at 127-30; *see also Gomez v. United States*, 109 S. Ct. 2237, 2241 (1989). "[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895), *quoted in DeBartolo*, 485 U.S. at 575; *e.g.*, *Frisby v. Schultz*, 487 U.S. 474, 483 (1988); *United States v. Clark*, 445 U.S. 23, 28-29, 31 (1980). Only the "clearest indication" that Congress intended what the challenged regulations prescribe would permit deference by this Court to an agency interpretation necessitating the resolution of serious constitutional issues. *NLRB v. Fruit & Vegetable Packers*, 377 U.S. 58, 63 (1964); *see Catholic Bishop*, 440 U.S. at 500 (requiring " 'affirmative intention of

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69 *See Massachusetts v. HHS*, 899 F.2d 53, 64-75 (1st Cir. 1990) (en banc) (regulations violate constitutional rights of privacy and free speech); 63-66a (Kearse, J., dissenting) (same); *Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465, 1473-78 (D. Colo. 1988) (same). *See also West Virginia Ass'n of Community Health Centers*, slip op. at 40-44, 56-57 (same as to portions of regulations).

the Congress *clearly expressed*' ") (emphasis added) (citation omitted).[70]

B. Section 59.8's Ban on Abortion Information, Counseling, and Referral Conflicts with the Language, History, and Purpose of Title X and Is Neither Required nor Expressly Authorized by Section 1008 of the Act.

This Court's review of an agency's construction of a statute begins with an evaluation of whether Congress has spoken to the precise question at issue. *Chevron*, 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43; *see also Fort Stewart Schools v. FLRA*, 110 S. Ct. 2043, 2046 (1990). The "starting point" in expounding a statute is its language, *Hallstrom v. Tillamook County*, 110 S. Ct. 304, 308 (1989) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980)), which must be read in a manner consistent with ordinary usage, *Dole v. United Steelworkers*, 110 S. Ct. 929, 934 (1990); *Fort Stewart Schools*, 110 S. Ct. at 2046, and in light of the structure, object, and policy of the statute as a whole, *see Massachusetts v. Morash*, 109 S. Ct. 1668, 1673 (1989); *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1817, 1821-22 (1988).

If the plain language of the statute is inconclusive, when faced with a "pure question of statutory construction," this Court must "determine congressional intent, using [its] traditional tools." *United Steelworkers*, 110 S. Ct. at 934; *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, 448 (1987).[71] These

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70 Without such an exacting standard, "decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." *Greene v. McElroy*, 360 U.S. 474, 507 (1959).

71 The "narrow legal question" of the appropriate construction of Title X is "quite different from the question of interpretation that arises in . . . case[s] in which the agency is required to apply . . . standards to a particular set of facts." *See Cardoza-Fonseca*, 480 U.S. at 446, 448. *See also* Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two*, 2 Admin. L.J. 255, 263-64 (1988) (distinguishing

tools of construction include review not only of the statutory language, but of its legislative history and administrative construction as well. *See NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123-25 (1987); *see also Davis v. United States*, 110 S. Ct. 2014, 2019-22 (1990). Because the judiciary is "the final authority" on pure questions of statutory construction,[72] *see Chevron*, 467 U.S. at 843 n.9; *Cardoza-Fonseca*, 480 U.S. at 447-48, deference to the agency is inappropriate except insofar as long-standing agency construction is probative of congressional intent. *See United Food & Commercial Workers*, 484 U.S. at 123, 124 n.20 (relying on agency construction to ascertain intent of Congress); *Davis*, 110 S. Ct. at 2022 (same).[73]

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between courts' responsibility to define statutes and agencies' responsibility to apply statutes).

72 When reviewing an agency interpretation of law, courts must not "slip into . . . judicial inertia" or "rubber-stamp" agency decisions. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983). *See also* Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 394 (1986) ("Courts are fully capable of rigorous review of agency determinations of law, for it is the law that they are expert in, and it is in interpreting law that their legitimacy is greatest."); Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 407, 446 (1989).

73 Courts should defer to an agency action only within the scope of authority delegated by Congress. *Adams Fruit Co. v. Barrett*, 110 S. Ct. 1384, 1390-91 (1990); *Public Citizen v. United States Dep't of Justice*, 109 S. Ct. 2558, 2571 n.12 (1989). Title X, unlike some statutes, does not delegate the authority to promulgate substantive regulations akin to "law." *E.g.*, *Batterton v. Francis*, 432 U.S. 416, 425 & n.9 (1977); *cf. Sullivan v. Zebley*, 110 S. Ct. 885, 888 & n.2, 890 (1990) (invalidating regulations promulgated under broad rule-making authority). Title X authorizes the Secretary to administer a federal grant program, not to regulate the family planning "industry."

Moreover, the challenged regulations do not stem from agency expertise regulating a complex industry according to technical and evolving standards. *See Chevron*, 467 U.S. at 865; *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1552 n.9 (1990). The construction of § 1008 is not uniquely within agency expertise but is instead a question of law for the courts to decide. *See Marsh*, 109 S. Ct. at 1860-61; *Aluminum Co. of Am. v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984). *See generally* Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 469 (1987); Breyer, *supra* note 72, at 368, 370; Byse, *supra* note 71, at 258.

1. The plain language of section 1008

The challenged regulations purport to interpret a narrow exception in the Title X statute: "None of the funds appropriated under [Title X] shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6 at J.A. 10. A clinic that provides counseling services to pregnant patients about a range of options, including abortion, is not in ordinary parlance one that uses abortion "as a method of family planning." As commonly understood, this phrase denotes the use of abortion as a substitute or equivalent to a method of contraception.[74]

The common meaning of the word "method" is "a procedure or process for attaining an object." *See Webster's Third New International Dictionary* 1422 (1965).[75] "Family planning" ordinarily means "planning intended to determine the number and spacing of one's children by effective methods of birth control," *Webster's Third New International Dictionary* 62a (1971 Addenda), a term itself defined as a means of "preventing or lessening the frequency of impregnation." *Webster's Third New International Dictionary* 221 (1965). A "method of family planning" is, thus, a particular contraceptive procedure or technology. Read in accord with common usage, therefore, section 1008 excludes abortion from the "broad range of . . . family planning *methods*" funded under section 300(a) of Title X. *See* 42 U.S.C. § 300(a)

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74 There is no evidence to support a charge that Title X providers have ever, or would ever, counsel pregnancy termination as a "family planning" option equivalent to diaphragms, IUDs, oral contraceptives, and other pregnancy prevention options. To the contrary, Title X programs, like all high quality providers of reproductive health services, treat abortion as a backup to contraceptive or human failure and as an option when pregnancy termination is medically indicated. *E.g.*, J.A. 254-55, 272. This understanding is consistent with both the ordinary meaning of the statutory phrase and with the agency's longstanding view. *See infra* Point IIIB(4).

75 In several recent cases, this Court has relied upon Webster's Dictionary to ascertain the plain meaning of a statute, *see, e.g.*, *Hughey v. United States*, 110 S. Ct. 1979, 1982 (1990); *Davis*, 110 S. Ct. at 2019; *Fort Stewart Schools*, 110 S. Ct. at 2046, and has invalidated statutory constructions that are inconsistent with such definitions. *See Hughey*, 110 S. Ct. at 1982-83; *Pittston Coal Group v. Sebben*, 109 S. Ct. 414, 420 (1988).

(emphasis added) at J.A. 3. Section 1008 makes no reference to "family planning . . . *services*," *id.*, which includes referrals, *see infra* Point IIIB(3).[76]

The phrase "abortion . . . [as] a method of family planning" in section 1008 qualifies the scope of programmatic activities to be provided pursuant to section 300(a), *see, e.g.*, *Department of Treasury, IRS v. FLRA*, 110 S. Ct. 1623, 1629 (1990), but the plain language of the section refers only to "abortion" and does not on its face exclude speech about abortion from the broad scope of medical and informational activities to be provided by Title X clinics. *See infra* Point IIIB(3). Indeed, when Congress has intended to ban counseling and referral for abortion, it has done so specifically. *See* Adolescent Family Life Demonstration Projects, 42 U.S.C. § 300z-10 (1982) (no funds for abortions or "abortion counseling or referral"); *see also* 42 U.S.C.A. § 300a-7(e) (West Supp. 1990) at J.A. 19 (no denial of training on basis of willingness or refusal to "counsel" abortions). Because Congress here chose a narrow exclusion to a statute of general application, "additional exceptions [ought] not to be implied." *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 617 (1980); *American Bank & Trust Co. v. Dallas County*, 463 U.S. 855, 864 (1983); *Addison v. Holly Hill Fruit Prods.*, 322 U.S. 607, 617 (1944).

2. The contemporaneous legislative history and administrative construction of section 1008

That section 1008's prohibition does not extend to speech is further supported by contemporaneous legislative and administrative history.[77] The Conference Report confirms

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76 In contrast with "method," the term "service" is defined broadly to encompass almost any activity that assists or benefits another. *See generally Webster's Third New International Dictionary* 2075 (1965).

77 The contemporaneous legislative history of a statute constitutes the most reliable indicator of congressional intent, and the Conference Report is the most persuasive of the available contemporaneous sources. *See National Ass'n of Greeting Card Publishers v. United States Postal Serv.*, 462 U.S.

that the plain language of section 1008 "prohibits the use of [Title X] funds for *abortion*." *See* H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. 8-9, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5081-82 ("*Conf. Rep.*") (emphasis added) at 70a. This Report also makes clear that section 1008 was intended as a narrow prohibition that would not interfere with Title X's expansive scope, *see infra* Point IIIB(3), or with programs providing abortions with separate funds and operated in accordance with state and local laws.[78] *See Conf. Rep.* at 5082; *see also infra* Point IIIC.

Contemporaneous agency constructions of section 1008 further confirm its narrow scope.[79] Indeed, an HHS General Counsel memorandum specifically concluded that "read literally[,] the phrase 'programs where abortion is a method of

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810, 832 n.28 (1983). This Court has frequently relied on contemporaneous indications of legislative intent as well as upon contemporaneous administrative interpretations to ascertain the meaning of statutory language. *See, e.g., Davis*, 110 S. Ct. at 2021-22; *Morash*, 109 S. Ct. at 1673-74; *United Food & Commercial Workers*, 484 U.S. at 123-30.

78 When Title X was enacted in 1970, Congress knew that the vast majority of states permitted abortions under varying circumstances. *See* 116 Cong. Rec. 24097-101 (1970); *Family Planning and Population Research, 1970: Hearings on S. 2108 and S. 3219 Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 2d Sess. 214 (1970) (testimony of Dr. Gerald Dorman, President, AMA); 116 Cong. Rec. 10279 (1970) (statement of Sen. Tydings). *See generally* B. Sarvis & H. Rodman, *The Abortion Controversy* 31-32 (1973); Roemer, *Abortion Law Reform and Repeal: Legislative and Judicial Developments*, 61 Am. J. Pub. Health 500 (1971).

79 In seeking to construe statutory language, this Court accords "great weight" to contemporaneous agency constructions of a statute, *Bank-America Corp. v. United States*, 462 U.S. 122, 130 (1983); *see also United Food & Commercial Workers*, 484 U.S. at 124 n.20; *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981), including those in the form of informal agency "interpretations and practices," *Davis*, 110 S. Ct. at 2022. This is because the agency is "presumed to have been aware of congressional intent" in enacting the law, *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979), may have been involved in drafting the legislation, *see Central Lincoln*, 467 U.S. at 390; *Rice v. Rehner*, 463 U.S. 713, 730 n.13 (1983), or may have had congressional "oversight and approval" when formulating the initial regulations, *see School Bd. v. Arline*, 480 U.S. 273, 279 (1987).

family planning,' most reasonably limits the prohibition contained in section 1008 to the financial support of programs in which abortions *are provided* as a method of family planning." Memorandum from Joel M. Mangel, Deputy Ass't Gen. Counsel, to Louis M. Hellman, M.D., Deputy Ass't Sec. for Pop. Affairs, at 2 (Apr. 20, 1971) ("*1971 Mangel Memo*") (emphasis in original) at J.A. 36.[80] Moreover, consistent with congressional recognition that abortion was widely available and legal in an ever-increasing array of circumstances and states, the agency recognized the proper place of abortion services "as a backup measure for contraceptive failure . . . ." National Center for Family Planning Servs., Health Servs. & Mental Health Admin., Department of Health, Educ., & Welfare, *A Five-Year Plan for the Delivery of Family Planning Services* 319 (Oct. 1971) ("*1971 Five-Year Plan*") at J.A. 42.

3. The structure, object, and policy of Title X as a whole

The structure and design of the statute as a whole reveal the intended breadth of the Title X program. *See Sullivan v. Everhart*, 110 S. Ct. 960, 964 (1990); *K Mart*, 486 U.S. at 291. The opening provision of the statute articulates its central goal: "[T]o assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services . . . ." 42 U.S.C. § 300(a) at J.A. 3. The "services" to be provided by Title X clinics were intentionally "broad," *see id.*, and "comprehensive," 42 U.S.C.A. § 300 historical note (West 1982) at 70a; 116 Cong. Rec. 37370 (1970) (statement of Rep. Bush) ("a broad range of maternal and child-health care services" include "complete yearly physical examinations" and "referrals"), because Congress

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80 The agency's 1971 regulations reiterated the view that the statute proscribed only "*abortions* as a method of family planning." Regulations Governing Grants for Family Planning Services, 36 Fed. Reg. 18466 (1971) (§ 59.5(a)(9)) (emphasis added) at J.A. 21; *see also* 42 C.F.R. § 59.5 (1986) (projects must "not *provide abortions* as a method of family planning") (emphasis added) at J.A. 26; 45 Fed. Reg. 37436-37 (1980) (same).

was aware that Title X would be the only source of medical care for some women.[81]

The express purposes of the Title X program include

> assist[ing] in making comprehensive voluntary family planning services readily available to all persons desiring such services; . . . enabl[ing] public and nonprofit private entities to plan and develop comprehensive programs of family planning services; [and] . . . develop[ing] and mak[ing] readily available information (including educational materials) on family planning and population growth to all persons desiring such information . . . .

42 U.S.C.A. § 300 historical note at 70-71a. As the Conference Report itself stated, in addition to "preventive family planning services," Title X was to fund "other related medical, informational, and educational activities." *Conf. Rep.* at 5081-82. Indeed, the Senate Report stressed that

> family planning [is not] merely a euphemism for birth control. It is properly a part of comprehensive health care and should consist of much more than the dispensation of contraceptive devices . . . . [A] successful family planning program must contain . . . [m]edical services, including consultation, examination, prescription, and continuing supervision, supplies, instruction, and referral to other medical services as needed.

S. Rep. No. 1004, 91st Cong., 2d Sess., *reprinted in* 116 Cong. Rec. 24095-96 (1970). This broad view of the Title X program is equally reflected in the agency's contemporaneous

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81 The Senate expressed the goal of providing reproductive health care to the "over five million American women [who] are denied access to modern, effective, medically safe family planning services due to financial need . . . ." 116 Cong. Rec. 24093 (1970) (statement of Sen. Hart) (quoting preamble of original Senate bill). *See also* H.R. Rep. No. 1472, 91st Cong., 2d Sess. 7, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5068, 5074.

construction of the statute and its purpose.[82] Thus, it appears that the statutory phrase "family planning . . . services" was specifically intended to include information and referrals, as needed and without exception, consonant with the broad object and policy of Title X as a whole.

4. Subsequent legislative and administrative history of Title X

Although this Court is ordinarily loathe to rely on subsequent legislative history as a tool of statutory construction, the subsequent history of Title X reveals a legislative endorsement of HHS's administration of the program that the Secretary seeks to bypass by regulatory fiat. Congress has repeatedly rejected amendments that would have restricted counseling, information, or referral for abortions in Title X facilities.[83] *See Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983); *Pacific Gas & Elec. Co. v. State Energy*

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82 The agency's 1971 regulations required Title X funded programs to "[p]rovi[de] for medical services related to family planning including . . . necessary referral," 36 Fed. Reg. 18466 (§ 59.5(d)) at J.A. 21, and to "[p]rovi[de] for social services related to family planning, including counseling, referral . . . and such ancillary services as are necessary . . . ." *Id.* (§ 59.5(e)) at J.A. 21. In the first *Five-Year Plan*, the agency stated:

> In addition to specific contraceptive services, programs should make available other related medical examinations and tests to assist in the early detection of illness and disease. While the program cannot provide full medical care because of its specialized nature, services should be provided for the screening and referral, including followup, of the patient to appropriate physicians, hospitals or other programs for necessary treatment. This mechanism is vital, given the fact that family planning is often the point of entry into a fragmented health care system for many individuals.

1971 *Five-Year Plan* at J.A. 41.

83 For example, in 1974 and 1975 Congress explicitly considered and rejected three amendments prohibiting the use of federal funds for abortion referral services or promoting or encouraging abortion, *see* 120 Cong. Rec. 21687-95 (1974); 121 Cong. Rec. 20863-64 (1975); 30 Cong. Quart. Almanac 97 (1974). *See generally* Brief for Petitioners the State of New York, *et al.*, *New York v. Sullivan* (No. 89-1392) (full discussion of the subsequent legislative history of Title X); Brief of Representative Patricia Schroeder, *et al.* as *Amicus Curiae* in Support of Petitioners, *Rust v. Sullivan* and *New York v. Sullivan* (Nos. 89-1391, 1392) (same).

Resources Conservation & Dev. Comm'n, 461 U.S. 190, 220 (1983). Indeed, "[i]t is hardly conceivable that Congress . . . was not abundantly aware" at these times of the agency's longstanding interpretation of Title X.[84] *See Bob Jones*, 461 U.S. at 600-01. Where Congress decides not to overturn or alter a longstanding agency policy of which it is aware, this Court has been reluctant to endorse an alteration in the reading of a statute. *See Young v. Community Nutrition Inst.*, 476 U.S. 974, 983 (1986); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

In the instant case, the agency has long adhered to its contemporaneous construction of section 1008 and, on at least eight separate occasions, the agency explicitly stated its view that nondirective counseling and referral are permitted by Title X programs. *See generally* Exhibit C. The agency recognized that such counseling and referral does not steer women to have abortions, but rather permits them to make an informed and voluntary decision.[85] Further, referral of clients to abortion services when pregnancy termination was medically indicated was not considered to be a referral for abortion *as a method of family planning*. Memorandum from

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84 Throughout the history of Title X, Congress received and reviewed reports from the agency regarding the administration of the program. 42 U.S.C. §§ 300a-6a(a). In 1985, Congress' awareness of the agency's construction of § 1008 permitting nondirective counseling and referral for all pregnancy options including abortion was explicit. H.R. Rep. No. 403, 99th Cong., 1st Sess. 6 (1985) at 281A (stating that "[n]o agency shall be considered in violation of" Title X for providing "information and counseling" regarding "pregnancy termination"); *see also, e.g.*, H.R. Conf. Rep. No. 960, 99th Cong., 2d Sess. 12 (1986) at 777A (expressing concern that "the program not be changed through administrative action"); H.R. Rep. No. 159, 99th Cong., 1st Sess. 6-7 (1985) at 278-79A (disapproving of agency efforts "to create restrictions beyond the original intent of the law as unnecessary and without statutory foundation").

85 Letter from Louis M. Hellman, M.D., Deputy Ass't Sec. for Pop. Affairs, to Hilary H. Connor, M.D., Regional Health Admin'r (Nov. 19, 1976) ("A counselor working under the aegis of a physician . . . has not only a First Amendment right but [a] duty to inform a patient of all legal options.") at 74a; Memorandum from Carol Conrad, Senior Attorney, Pub. Health Div., Office of Family Planning (Apr. 14, 1978) at J.A. 56; Memorandum from Louis Balmonte, Regional Program Consultant, Office for Family Planning (May 25, 1979) at 75a.

Carol Conrad, Senior Attorney, Pub. Health Div., to Elsie Sullivan, Office for Family Planning (July 25, 1979) at J.A. 61-62.[86] Finally, in 1981 the agency adopted new Program Guidelines explicitly *requiring* that all pregnant patients receive nondirective counseling on *all* pregnancy alternatives, including abortion, and appropriate referral upon request. *1981 Program Guidelines* § 8.6 at 71a.

The Secretary's newfound construction of the meaning of section 1008 conflicts with the agency's long-held understanding of the statute. *See United Food & Commercial Workers*, 484 U.S. at 124 n.20; *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 41-42 (1983); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 651 n.58 (1980). The agency's reinterpretation is, therefore, "entitled to considerably less deference," *Cardoza-Fonseca*, 480 U.S. at 446 n.30 (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)), especially in light of the grave constitutional questions it needlessly engenders.

C. Section 59.9, Together with Section 59.2, Conflicts with the Language, Structure, and Purpose of Title X and Is Not Required or Expressly Authorized by Section 1008 of the Act.

The Secretary's definition of "project funds," § 59.2, and his unprecedented requirement of physical separation between permitted and prohibited activities, *see* § 59.9, burden the expressive use of non-Title X monies by grantees. Because these regulations independently raise serious constitutional concerns in this regard, *see supra* Point IB,[87] the agency must demonstrate that Congress clearly intended the adoption of regulatory provisions that would censor and restrict the communicative use of non-Title X income generated by grantees.

86 Similarly, information about abortion as a backup (as opposed to as a substitute) for contraception was not considered to present abortion as a method of family planning. *See, e.g.*, Memorandum from Joel M. Mangel, Deputy Ass't Gen. Counsel, to Louis M. Hellman, M.D., Deputy Ass't Sec. for Pop. Affairs at 4 (Jan. 18, 1973) at J.A. 47-48.

87 The Secretary does not refute that such a result raises "constitutional concerns." *See* Pr., 53 Fed. Reg. 2935, 2943.

DeBartolo, 485 U.S. at 575; *Catholic Bishop*, 440 U.S. at 500-01.

A review of the language of Title X shows that the statute not only fails to authorize the challenged regulations, but prohibits them. Contrary to the Secretary's novel expansion of his authority, *see* § 59.2; *see generally supra* Point IB(1), Congress authorized the Secretary to issue regulations that govern only "[g]rants and contracts made under this [Title X] subchapter." 42 U.S.C. § 300a-4(a) at J.A. 8. As to section 59.9, the plain language of Title X nowhere specifically suggests or requires that Title X clinics physically isolate themselves from general health care programs or from programs that provide abortions or abortion information with non-Title X funds. To the contrary, the statute by its terms requires establishment of a "State plan for a *coordinated* and comprehensive program of family planning services." 42 U.S.C. § 300a(a) (emphasis added) at J.A. 4.

The legislative history of Title X confirms that the abortion prohibition was "not intended to interfere with or limit programs . . . supported by funds other than those authorized under this legislation," *Conf. Rep.* at 5082, including programs that counsel or provide abortions.[88] Similarly, the agency's contemporaneous construction of the statute further explained that the word "program" in section 1008 did not include any and all family planning activities carried on by a Title X recipient, as this would undermine Congress' desire not to interfere with or limit other programs. *1971 Mangel Memo* at J.A. 38. HHS did not, therefore, require physical separation between activities prohibited and those permitted under Title X. *See id.* The Secretary makes no effort to reconcile this earlier conclusion, or the identical conclusion by

88 The Statement of Purpose in the House Report preceding the passage of Title X similarly stressed the importance of developing a comprehensive and coordinated program. *Conf. Rep.* at 5068. Subsequent legislative history further confirms that Congress sought to create a program coordinated and integrated with general health care services. S. Rep. No. 63, 94th Cong., 1st Sess. 65-66 (1975), *reprinted in* 1975 U.S. Code Cong. & Admin. News 528; *see also* H.R. Rep. No. 1524, 93rd Cong., 2d Sess. 58 (1974) (Title X services "most effectively provided in a general health setting"); 124 Cong. Rec. 31241-42 (1978).

the General Accounting Office,[89] with his current determination that "[h]aving a program that is separate from such [prohibited] activities is a necessary predicate to any determination that abortion is not being included as a method of family planning." Pr., 53 Fed. Reg. 2940.

Because the challenged regulations will place severe restrictions on programs supported by non-Title X funds that are operated by Title X grantee organizations, *see generally supra* Point IB, the requirement of physical separation not only will raise serious constitutional concerns but also will defeat the explicit legislative object and policy of expanding and integrating family planning services provided to low-income women. *See supra* Point IIIB(3). In fact, it is undisputed that many Title X clinics would be unable to afford a physically separate facility and would be forced to close. *Id.* As the First Circuit concluded, section 59.9 therefore exceeds the Secretary's authority under the statute, *Massachusetts v. HHS*, 899 F.2d at 60;[90] indeed, it promises to devastate the vast network of high quality clinical services that Title X has so successfully fostered.

CONCLUSION

Petitioners respectfully ask this Court to reverse the judgment of the Second Circuit Court of Appeals and to invalidate the challenged regulations codified at 42 C.F.R. §§ 59.2, 59.8, 59.9, 59.10.

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89 The GAO Report reiterated the agency's conclusion that "the activities (abortion and non-abortion) must be so separated as to constitute separate programs (projects). As we have already indicated, our conclusion does not require separate grantees or even a separate health facility." *GAO Report* at J.A. 109.

90 Moreover, the regulations are arbitrary and capricious, *see* 66a (Kearse, J., dissenting), and otherwise impermissible in that they reverse long-standing agency policy without "good reason for the change," *see Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835, 1848 (1989); *see also* GAO Report at J.A. 84, and adopt a construction of the statute that will compel clinics that Congress sought to create to close their doors. *See supra* Point IB(2). Petitioners herein rely on co-petitioners, the State of New York, *et al.*, for further elaboration of this point. *See generally* Brief for Petitioners the State of New York, *et al.*, *New York v. Sullivan* (No. 89-1392).

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Respectfully submitted,

LAURENCE H. TRIBE
KATHLEEN M. SULLIVAN
1525 Massachusetts Avenue
Cambridge, MA 02138

RACHAEL N. PINE
(Counsel of Record)
JANET BENSHOOF
LYNN PALTROW
KATHRYN KOLBERT
STEVEN R. SHAPIRO
LOUISE MELLING
ROBIN ABRAMS
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800 ext. 520

NORMAN SIEGEL
ARTHUR EISENBERG
New York Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 382-0557

Of Counsel:

ROGER K. EVANS
Planned Parenthood Action Fund, Inc.
810 Seventh Avenue
New York, New York 10019
(212) 541-7800

LAURIE R. ROCKETT
Hollyer, Jones, Brady, Smith, Troxell, Barrett & Chira
342 Madison Avenue
New York, New York 10173
(212) 818-1110

EXHIBIT A

Regulations Governing Grants for Family Planning Services, 42 C.F.R. §§ 59.1-59.10 (1988).

PART 59—GRANTS FOR FAMILY PLANNING SERVICES

* * * *

Subpart A—Project Grants for Family Planning Services

§ 59.1 To what programs do these regulations apply?

The regulations of this subpart are applicable to the award of grants under section 1001 of the Public Health Service Act (42 U.S.C. 300) to assist in the establishment and operation of voluntary family planning projects. These projects shall consist of the educational, comprehensive medical, and social services necessary to aid individuals to determine freely the number and spacing of their children.

§ 59.2 Definitions.

As used in this subpart:

"*Act*" means the Public Health Service Act, as amended.

"*Family*" means a social unit composed of one person, or two or more persons living together, as a household.

"*Family planning*" means the process of establishing objectives for the number and spacing of one's children and selecting the means by which those objectives may be achieved. These means include a broad range of acceptable and effective methods and services to limit or enhance fertility, including contraceptive methods (including natural family planning and abstinence) and the management of infertility (including adoption). Family planning services includes preconceptional counseling, education, and general reproductive health care (including diagnosis and treatment of infections which threaten reproductive capability). Family planning does not include pregnancy care (including obstetric or prenatal

care). As required by section 1008 of the Act, abortion may not be included as a method of family planning in the Title X project. Family planning, as supported under this subpart, should reduce the incidence of abortion.

"*Grantee*" means the organization to which a grant is awarded under section 1001 of the Act.

"*Low-income family*" means a family whose total annual income does not exceed 100 percent of the most recent Community Services Administration Income Poverty Guidelines (45 CFR 1060.2). "*Low-income family*" also includes members of families whose annual family income exceeds this amount, but who, as determined by the Title X project director, are unable, for good reasons, to pay for family planning services. For example, unemancipated minors who wish to receive services on a confidential basis must be considered on the basis of their own resources.

"*Nonprofit*," as applied to any private agency, institution, or organization, means that no part of the entity's net earnings benefit, or may lawfully benefit, any private shareholder or individual.

"*Prenatal care*" means medical services provided to a pregnant woman to promote maternal and fetal health.

"*Program*" and "*project*" are used interchangeably and mean a coherent assembly of plans, activities and supporting resources contained within an administrative framework.

"*Secretary*" means the Secretary of Health and Human Services and any other officer or employee of the Department of Health and Human Services to whom the authority involved has been delegated.

"*State*" means one of the 50 States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa, Northern Marianas, or the Trust Territory of the Pacific Islands.

"*Title X*" means Title X of the Act, 42 U.S.C. 300, *et seq.*

"*Title X program*" and "*Title X project*" are used interchangeably and mean the identified program which is approved by the Secretary for support under section 1001 of the Act, as the context may require. Title X project funds include all funds allocated to the Title X program, including but not limited to grant funds, grant-related income or matching funds.

§ 59.3 Who is eligible to apply for a family planning services grant?

Any public or nonprofit private entity in a State may apply for a grant under this subpart.

§ 59.4 How does one apply for a family planning services grant?

(a) Application for a grant under this subpart shall be made on an authorized form.

(b) An individual authorized to act for the applicant and to assume on behalf of the applicant the obligations imposed by the terms and conditions of the grant, including the regulations of this subpart, must sign the application.

(c) The application shall contain—

(1) A description, satisfactory to the Secretary, of the project and how it will meet the requirements of this subpart;

(2) A budget and justification of the amount of grant funds requested;

(3) A description of the standards and qualifications which will be required for all personnel and for all facilities to be used by the project; and

(4) Such other pertinent information as the Secretary may require.

§ 59.5 What requirements must be met by a family planning project?

(a) Each project supported under this part must:

(1) Provide a broad range of acceptable and effective medically approved family planning methods (including natural family planning methods) and services (including infertility services and services for adolescents). If an organization offers only a single method of family planning, such as natural family planning, it may participate as part of a Title X project as long as the entire Title X project offers a broad range of family planning services.

(2) Provide services without subjecting individuals to any coercion to accept services or to employ or not to employ any particular methods of family planning. Acceptance of services must be solely on a voluntary basis and may not be made a prerequisite to eligibility for, or receipt of, any other service, assistance from or participation in any other program of the applicant.

(3) Provide services in a manner which protects the dignity of the individual.

(4) Provide services without regard to religion, race, color, national origin, handicapping condition, age, sex, number of pregnancies, or marital status.

(5) Provide that priority in the provision of services will be given to persons from low-income families.

(6) Provide that no charge will be made for services provided to any person from a low-income family except to the extent that payment will be made by a third party (including a Government agency) which is authorized to or is under legal obligation to pay this charge.

(7) Provide that charges will be made for services to persons other than those from low-income families in accordance with a schedule of discounts based on ability to pay, except that charges to persons from families whose annual income exceeds 250 percent of the levels set forth in the most

recent CSA Income Poverty Guidelines (45 CFR 1060.2) will be made in accordance with a schedule of fees designed to recover the reasonable cost of providing services.

(8) If a third party (including a Government agency) is authorized or legally obligated to pay for services, all reasonable efforts must be made to obtain the third-party payment without application of any discounts. Where the cost of services is to be reimbursed under title XIX or title XX of the Social Security Act, a written agreement with the title XIX or title XX agency is required.

(9)(i) Provide that if an application relates to consolidation of service areas or health resources or would otherwise affect the operations of local or regional entities, the applicant must document that these entities have been given, to the maximum feasible extent, an opportunity to participate in the development of the application. Local and regional entities include existing or potential subgrantees which have previously provided or propose to provide family planning services to the area proposed to be served by the applicant.

(ii) Provide an opportunity for maximum participation by existing or potential subgrantees in the ongoing policy decisionmaking of the project.

(10) Provide for an Advisory Committee as required by § 59.6.

(b) In addition to the requirements of paragraph (a) of this section, each Title X project must meet each of the following requirements unless the Secretary determines that the Title X project has established good cause for its omission. Each Title X project must:

(1) Provide for medical services related to family planning (including physician's consultation, examination prescription, and continuing supervision, laboratory examination, contraceptive supplies) and necessary referral to other medical facilities when medically indicated, and provide for the effective usage of contraceptive devices and practices.

(2) Provide for social services related to family planning, including counseling, referral to and from other social and medical service agencies, and any ancillary services which may be necessary to facilitate clinic attendance.

(3) Provide for informational and educational programs designed to (i) achieve community understanding of the objectives of the Title X program, (ii) inform the community of the availability of services, and (iii) promote continued participation in the Title X project by persons to whom family planning services may be beneficial.

(4) Provide for orientation and in-service training for all Title X project personnel.

(5) Provide services without the imposition of any durational residency requirement or requirement that the patient be referred by a physician.

(6) Provide that family planning medical services will be performed under the direction of a physician with special training or experience in family planning.

(7) Provide that all services purchased for Title X project participants will be authorized by the Title X project director or his designee on the Title X project staff.

(8) Provide for coordination and use of referral arrangements with other providers of health care services, local health and welfare departments, hospitals, voluntary agencies, and health services projects supported by other Federal programs.

(9) Provide that if family planning services are provided by contract or other similar arrangements with actual providers of services, services will be provided in accordance with a plan which establishes rates and methods of payment for medical care. These payments must be made under agreements with a schedule of rates and payment procedures maintained by the grantee. The grantee must be prepared to substantiate that these rates are reasonable and necessary.

(10) Provide, to the maximum feasible extent, an opportunity for participation in the development, implementation, and evaluation of the Title X project by persons broadly representative of all significant elements of the population to be served, and by others in the community knowledgeable about the community's needs for family planning services.

* * * *

§ 59.7 Standards of compliance with prohibition on abortion.

A project may not receive funds under this subpart unless it provides assurance satisfactory to the Secretary that it does not include abortion as a method of family planning. Such assurance must include, as a minimum, representations (supported by such documentation as the Secretary may request) as to compliance with each of the requirements in § 59.8 through § 59.10. A project must comply with such requirements at all times during the period for which support under Title X is provided.

§ 59.8 Prohibition on counseling and referral for abortion services; limitation of program services to family planning.

(a)(1) A Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.

(2) Because Title X funds are intended only for family planning, once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child. She must also be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept. In cases in which emergency care is required, however, the Title X project shall

be required only to refer the client immediately to an appropriate provider of emergency medical services.

(3) A Title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by "steering" clients to providers who offer abortion as a method of family planning.

(4) Nothing in this subpart shall be construed as prohibiting the provision of information to a project client which is medically necessary to assess the risks and benefits of different methods of contraception in the course of selecting a method; *provided*, that the provision of this information does not include counseling with respect to or otherwise promote abortion as a method of family planning.

(b) *Examples.* (1) A pregnant client of a Title X project requests prenatal care services, which project personnel are qualified to provide. Because the provision of such services is outside the scope of family planning supported by Title X, the client must be referred to appropriate providers of prenatal care.

(2) A Title X project discovers an ectopic pregnancy in the course of conducting a physical examination of a client. Referral arrangements for emergency medical care are immediately provided. Such action is in compliance with the requirements of paragraph (a)(2) of this section.

(3) A pregnant woman asks the Title X project to provide her with a list of abortion providers in the area. The Title X project tells her that it does not refer for abortion but provides her a list which includes, among other health care providers, a local clinic which principally provides abortions.

Inclusion of the clinic on the list is inconsistent with paragraph (a)(3) of this section.

(4) A pregnant woman asks the Title X project to provide her with a list of abortion providers in the area. The project tells her that it does not refer for abortion and provides her a list which consists of hospitals and clinics and other providers which provide prenatal care and also provide abortions. None of the entries on the list are providers that principally provide abortions. Although there are several appropriate providers of prenatal care in the area which do not provide or refer for abortions, none of these providers are included on the list. Provision of the list is inconsistent with paragraph (a)(3) of this section.

(5) A pregnant woman requests information on abortion and asks the Title X project to refer her to an abortion provider. The project counselor tells her that the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion. The counselor further tells the client that the project can help her to obtain prenatal care and necessary social services, and provides her with a list of such providers from which the client may choose. Such actions are consistent with paragraph (a) of this section.

(6) Title X project staff provide contraceptive counseling to a client in order to assist her in selecting a contraceptive method. In discussing oral contraceptives, the project counselor provides the client with information contained in the patient package insert accompanying a brand of oral contraceptives, referring to abortion only in the context of a discussion of the relative safety of various contraceptive methods and in no way promoting abortion as a method of family planning. The provision of this information does not constitute abortion counseling or referral.

§ 59.9 Maintenance of program integrity.

A Title X project must be organized so that it is physically and financially separate, as determined in accordance with

the review established in this section, from activities which are prohibited under section 1008 of the Act and § 59.8 and § 59.10 of these regulations from inclusion in the Title X program. In order to be physically and financially separate, a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient. The Secretary will determine whether such objective integrity and independence exist based on a review of facts and circumstances. Factors relevant to this determination shall include (but are not limited to):

(a) The existence of separate accounting records;

(b) The degree of separation from facilities (*e.g.*, treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities;

(c) The existence of separate personnel;

(d) The extent to which signs and other forms of identification of the Title X project are present and signs and material promoting abortion are absent.

§ 59.10 Prohibition on activities that encourage, promote or advocate abortion.

(a) A Title X project may not encourage, promote or advocate abortion as a method of family planning. This requirement prohibits actions to assist women to obtain abortions or increase the availability or accessibility of abortion for family planning purposes. Prohibited actions include the use of Title X project funds for the following:

(1) Lobbying for the passage of legislation to increase in any way the availability of abortion as a method of family planning;

(2) Providing speakers to promote the use of abortion as a method of family planning;

(3) Paying dues to any group that as a significant part of its activities advocates abortion as a method of family planning;

(4) Using legal action to make abortion available in any way as a method of family planning; and

(5) Developing or disseminating in any way materials (including printed matter and audiovisual materials) advocating abortion as a method of family planning.

(b) *Examples.* (1) Clients at a Title X project are given brochures advertising an abortion clinic. Provision of the brochure violates subparagraph (a) of this section.

(2) A Title X project makes an appointment for a pregnant client with an abortion clinic. The Title X project has violated paragraph (a) of this section.

(3) A Title X project pays dues to a state association which, among other activities, lobbies at state and local levels for the passage of legislation to protect and expand the legal availability of abortion as a method of family planning. The association spends a significant amount of its annual budget on such activity. Payment of dues to the association violates paragraph (a)(3) of this section.

(4) An organization conducts a number of activities, including operating a Title X project. The organization uses non-project funds to pay dues to an association which, among other activities, engages in lobbying to protect and expand the legal availability of abortion as a method of family planning. The association spends a significant amount of its annual budget on such activity. Payment of dues to the association by the organization does not violate paragraph (a)(3) of this section.

(5) An organization that operates a Title X project engages in lobbying to increase the legal availability of abortion as a method of family planning. The project itself engages in no such activities and the facilities and funds of the project are

kept separate from prohibited activities. The project is not in violation of paragraph (a)(1) of this section.

(6) Employees of a Title X project write their legislative representatives in support of legislation seeking to expand the legal availability of abortion, using no project funds to do so. The Title X project has not violated paragraph (a)(1) of this section.

(7) On her own time and at her own expense, a Title X project employee speaks before a legislative body in support of abortion as a method of family planning. The Title X project has not violated paragraph (a) of this section.

* * * *

EXHIBIT B

Thus far, thirty states and the District of Columbia have held that physicians may be liable for failure to disclose alternative treatments or information material to the patient's ability to make informed medical decisions.

Alaska:	*Poulin v. Zartman*, 542 P.2d 251, 275 & n.57 (Alaska 1975).
Arkansas:	*Pegram v. Sisco*, 406 F. Supp. 776, 779-80 (W.D. Ark.), *aff'd*, 547 F.2d 1172 (8th Cir. 1976).
California:	*Moore v. Regents of Univ. of California*, No. S006987, slip op. at 10 (Cal. July 9, 1990); *Cobbs v. Grant*, 8 Cal. 3d 229, 242, 502 P.2d 1, 10, 104 Cal. Rptr. 505, 514 (1972) (en banc); *Nelson v. Gaunt*, 125 Cal. App. 3d 623, 634-35, 178 Cal. Rptr. 167, 172-73 (1981).
Colorado:	*Bloskas v. Murray*, 646 P.2d 907, 913 (Colo. 1982).
Connecticut:	*Logan v. Greenwich Hosp. Ass'n*, 191 Conn. 282, 290-93, 465 A.2d 294, 299-301 (1983).
District of Columbia:	*Hartke v. McKelway*, 707 F.2d 1544, 1548-49 (D.C. Cir.), *cert. denied*, 464 U.S. 983 (1983); *Crain v. Allison*, 443 A.2d 558, 562 (D.C. 1982).
Hawaii:	*Leyson v. Steuermann*, 5 Haw. App. 504, 512, 705 P.2d 37, 44 (1985).
Idaho:	*LePelley v. Grefenson*, 101 Idaho 422, 429, 614 P.2d 962, 969 (1980).
Illinois:	*Hansbrough v. Kosyak*, 141 Ill. App. 3d 538, 551, 490 N.E.2d 181, 190 (1986).

Indiana: *Martin v. Rinck*, 501 N.E.2d 1086, 1087 (Ind. Ct. App. 1986); *Weinstock v. Ott*, 444 N.E.2d 1227, 1236 (Ind. Ct. App. 1983).

Iowa: *Pauscher v. Iowa Methodist Medical Center*, 408 N.W.2d 355, 359-60 (Iowa 1987).

Louisiana: *Hondroulis v. Schumacher*, 546 So.2d 466, 469-70 (La. 1989); *Harwell v. Pittman*, 428 So.2d 1049, 1054 (La. Ct. App. 1983).

Maine: *Jacobs v. Painter*, 530 A.2d 231, 235 (Me. 1987).

Maryland: *Sard v. Hardy*, 281 Md. 432, 440, 379 A.2d 1014, 1020 (1977).

Massachusetts: *Kissinger v. Lofgren*, 836 F.2d 678, 680-81 (1st Cir. 1988); *Harnish v. Children's Hosp. Medical Center*, 387 Mass. 152, 155, 439 N.E.2d 240, 243 (1982).

Minnesota: *Kinikin v. Heupel*, 305 N.W.2d 589, 594-95 (Minn. 1981); *Cornfeldt v. Tongen*, 295 N.W.2d 638, 640 & n.2 (Minn. 1980) (en banc).

Nebraska: *Muller v. Thaut*, 230 Neb. 244, 250-51, 430 N.W.2d 884, 889 (1988).

New Jersey: *Largey v. Rothman*, 110 N.J. 204, 208, 213, 540 A.2d 504, 506, 509 (1988).

New Mexico: *Keithley v. St. Joseph's Hosp.*, 102 N.M. 565, 569, 698 P.2d 435, 439 (Ct. App. 1984).

New York: *Nisenholtz v. Mount Sinai Hosp.*, 126 Misc. 2d 658, 660-61, 483 N.Y.S.2d 568, 570 (Sup. Ct. 1984), *aff'd*, 115 A.D.2d 1022, 496 N.Y.S.2d 886 (App. Div. 1985); *Crisher v. Spak*, 122 Misc. 2d 355, 359, 471 N.Y.S.2d 741, 744 (Sup. Ct. 1983).

North Dakota: *Winkjer v. Herr*, 277 N.W.2d 579, 587 (1979).

Oklahoma: *Spencer By and Through Spencer v. Seikel*, 742 P.2d 1126, 1129 (Okla. 1987); *Smith v. Reisig*, 686 P.2d 285, 288-89 (Okla. 1984).

Oregon: *Getchell v. Mansfield*, 260 Or. 174, 183, 489 P.2d 953, 957 (1971).

Pennsylvania: *Moure v. Raeuchele*, 387 Pa. Super. 127, 132, 563 A.2d 1217, 1220 (Super. Ct. 1989).

South Dakota: *Wheeldon v. Madison*, 374 N.W.2d 367, 371, 375 (S.D. 1985); *Cunningham v. Yankton Clinic*, 262 N.W.2d 508, 511 (S.D. 1978).

Utah: *Nixdorf v. Hicken*, 612 P.2d 348, 354 (Utah 1980).

Vermont: *Small v. Gifford Memorial Hosp.*, 133 Vt. 552, 557, 349 A.2d 703, 706 (1975).

Virginia: *Bly v. Rhoads*, 216 Va. 645, 648, 222 S.E.2d 783, 785-86 (1976).

Washington: *Keoghan v. Holy Family Hosp.*, 95 Wash. 2d 306, 315, 318, 622 P.2d 1246, 1252, 1254 (1980) (en banc).

West Virginia: *Cross v. Trapp*, 294 S.E.2d 446, 455 (W. Va. 1982).

Wisconsin: *Scaria v. St. Paul Fire & Marine Ins. Co.*, 68 Wis. 2d 1, 11, 227 N.W.2d 647, 653 (1975).

EXHIBIT C

Chronology of Administrative Interpretations of Title X Permitting Nondirective Abortion Counseling and Referral

Oct. 1971

National Center for Family Planning Services, Health Services and Mental Health Administration, Department of Health, Education, and Welfare, *A Five-Year Plan for the Delivery of Family Planning Services*

"[A]bortions are . . . viewed as . . . a service that should be available in accordance with local laws only in the event of a human or contraceptive method failure . . . . Abortion would then serve as a backup measure for contraceptive failure, thereby still further assuring the freedom of choice of those who do not desire an unwanted birth." J.A. 42.

Jan. 18, 1973

Memorandum from Joel M. Mangel, Deputy Assistant General Counsel, to Louis M. Hellman, M.D., Deputy Assistant Secretary for Population Affairs

"[W]e continue to believe that [Dingell's statement] does not legally require the extension of [section 1008] to the collection and dissemination of information." J.A. 46.

Jan. 1976

United States Department of Health, Education, and Welfare, *Program Guidelines For Project Grants For Family Planning Services*

If a patient becomes pregnant with an IUD in place, "[t]he patient and her physician should discuss whether it is best to terminate or to continue the pregnancy." J.A. 51.

Title X project should "give pregnancy counseling, when appropriate . . . [and] [m]ake appropriate referrals for any needed services not furnished through the facility." J.A. 52.

Nov. 19, 1976

Letter from Louis M. Hellman, M.D., Deputy Assistant Secretary for Population Affairs, to Hilary H. Connor, M.D., Regional Health Administrator

"[I]f you are funded under Title X, you cannot promote or encourage abortion. In other words, you should not employ directive counseling in relation to abortions. A counselor working under the aegis of a physician, however, has not only a First Amendment right but [a] duty to inform a patient of all legal options. The right to make referrals comes under the First and Fourteenth Amendments as well as the Code of Ethics of the American Medical Association." 74a.

Apr. 14, 1978

Memorandum from Office of the General Counsel, Department of Health, Education, and Welfare

Consistent with section 1008, Title X projects may "[s]upply information to those who do not want to continue their pregnancies, and may be interested in obtaining abortions" and "[r]efer clients to doctors to obtain abortions." J.A. 54, 55.

"[T]he provision of information concerning abortion services, mere referral of an individual to another provider of services for an abortion, and the collection of statistical data and information regarding abortion are not considered to be proscribed by § 1008." J.A. 56.

May 25, 1979

Memorandum from Louis Belmonte, Regional Program Consultant, Family Planning

"The provision of information on abortion services and the mere referral of a patient to another provider for such a procedure are permissible." 75a.

July 25, 1979

Memorandum From Department of Health, Education, and Welfare [Carol Conrad, Senior Attorney, to Elsie Sullivan]

"[A] project *may*, consistent with § 1008, make 'mere referrals' for abortion, as long as it does not then go on to promote or encourage use of the procedure for family planning purposes." (emphasis in original) J.A. 62.

Where "a referral [for abortion] is necessary because of medical indications, abortion is not being considered as a method of family planning at all, but rather as a medical treatment . . . . As such, it would not come within the scope of § 1008 at all, since that section reaches only cases which relate to the use of abortion 'as a method of family planning.' " J.A. 63.

"[W]e do not believe that requiring referrals where abortion appears medically indicated falls afoul of this limitation either." J.A. 64.

Oct. 9, 1980

***Amicus* Brief of the Secretary of Health and Human Services, *Valley Family Planning v. North Dakota*, 661 F.2d 99 (8th Cir. 1981)**

"It is thus clear that referral services are a *required* part of the Title X program. The question, then, is whether this broad regulatory requirement for referral services includes a requirement for *abortion* referral services. We submit that it clearly does." (emphasis in original) 97A.

"[T]his agency has consistently interpreted sec. 1008 as not prohibiting 'mere referrals' for abortion." 98A.

1981

United States Department of Health and Human Services, *Program Guidelines for Project Grants for Family Planning Services*

Women "requesting information on options for the management of an unintended pregnancy are to be given non-directive counseling on the following alternative courses of action, and referral upon request:

— Prenatal care and delivery

— Infant care, foster care, or adoption

— Pregnancy termination"

71a.

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JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1990

IRVING RUST, ET AL., PETITIONERS

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

STATE OF NEW YORK, ET AL., PETITIONERS

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
JOHN G. ROBERTS, JR.
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant to the Solicitor General
ANTHONY J. STEINMEYER
LOWELL V. STURGILL, JR.
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

MICHAEL J. ASTRUE
General Counsel
JOEL MANGEL
Deputy Chief Counsel
CAROL C. CONRAD
Attorney
Department of Health and Human Services
Rockville, Md. 20857

BEST AVAILABLE COPY

QUESTION PRESENTED

Title X of the Public Health Service Act, which authorizes federal grants to support the provision of family planning services, provides that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. 300a-6. The implementing regulations prohibit Title X grant recipients from providing, within their Title X programs, abortions or abortion-related services, including counseling clients about abortion, referring them to facilities that provide abortions, or engaging in abortion-related advocacy. The question presented is whether those regulations violate Title X, the First Amendment rights of grantees and pregnant women, or the Fifth Amendment rights of pregnant women to terminate their pregnancy.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1391

IRVING RUST, ET AL., PETITIONERS

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

No. 89-1392

STATE OF NEW YORK, ET AL., PETITIONERS

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 35a-67a) is reported at 889 F.2d 401. The opinion of the district court (Pet. App. 9a-32a) is reported at 690 F. Supp. 1261.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1989. Justice Marshall extended the time to file a petition for certiorari to and including March 1, 1990, and the petitions were filed on that date. The petitions were granted on May 29, 1990. This Court's jurisdiction rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional provisions are set forth in petitioners' briefs (Rust Br. 1; N.Y. Br. 2). The statutory provisions are set forth in the joint appendix (J.A. 3-12), and the regulatory provisions are set forth in the petition appendix (Pet. App. 1a-8a).

STATEMENT

Congress enacted Title X of the Public Health Service Act to provide federal subsidies for certain types of family planning services. See Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, § 6(c), 84 Stat. 1505-1508, 42 U.S.C. 300 to 300a-6a. Section 1001(a) of Title X authorizes the Secretary of Health and Human Services (HHS) to make grants and enter into contracts with public or private nonprofit entities

> to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents).

42 U.S.C. 300(a). Section 1006(a) further provides that "[g]rants and contracts made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate." 42 U.S.C. 300a-4(a). However, Section 1008 expressly states:

> None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.

42 U.S.C. 300a-6. The Conference Report that accompanied the legislation specifically addressed this provision:

> It is, and has been, the intent of both Houses that the funds authorized under this legislation be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities. The conferees have adopted the language contained in section 1008, which prohibits the use of such funds for abortion, in order to make clear this intent.

H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. 8 (1970). As a sponsor of Section 1008 explained, "the committee members clearly intend that abortion is not to be encouraged or promoted in any way through this legislation." 116 Cong. Rec. 37,375 (1970) (Rep. Dingell). Petitioners challenge the Secretary's regulations implementing Section 1008. See 42 C.F.R. 59.7-59.10.

1. The Secretary's regulations are the product of nearly 20 years of experience in funding Title X family planning projects.[1] The Secretary's initial regulations, which remained largely unchanged from 1971 to 1986, did not provide clear guidance on the scope of Section 1008. They simply required that a grantee's application state that the Title X "project will not provide abortions as a method of family planning." 36 Fed. Reg. 18,465, 18,466 (1971); 42 C.F.R. 59.5(a)(9) (1972) (J.A. 21). See 45 Fed. Reg. 37,433, 37,437 (1980); 42 C.F.R. 59.5(a)(5) (1986) (J.A. 25-26).[2] During this period, HHS interpreted Title X to prohibit Title X projects from engaging in activities that "in any way promot[e] or encourag[e] abortion as a method of family planning." 53 Fed. Reg. 2922, 2923 (1988) (describing previous HHS guidelines and internal memoranda). See Pet. App. 42a-43a. However, HHS construed Title X to allow, and later required, that Title X projects provide "non-directive" counseling about pregnancy termination, including information about and referral for abortions through the provision of the names,

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[1] The terms "Title X project" and "Title X program" are used by the Secretary interchangeably, and can mean either the "program which is approved by the Secretary for support" or the "coherent assembly of plans, activities and supporting resources contained within an administrative framework." 42 C.F.R. 59.2. While Title X services may be delivered through a family planning clinic, the Title X project may be only one aspect of that clinic. See Rust Br. 3 n.5.

[2] The initial regulations also stated, without reference to abortion, that a grant application must contain provisions for medical and social services "related to family planning." 36 Fed. Reg. 18,466 (1971); 42 C.F.R. 59.5(d) and (e) (1972). See also 45 Fed. Reg. 37,437 (1980); 42 C.F.R. 59.5(b)(1) and (2).

addresses, and telephone numbers of abortion providers. *Id.* at 42a. See 53 Fed. Reg. 2923 (1988).[3]

In 1982, the General Accounting Office (GAO) and HHS's Office of the Inspector General (OIG) completed investigations into alleged misuses of Title X funds. See 53 Fed. Reg. 2923-2924 (1988). Auditing 14 clinics receiving Title X grants, the GAO found that a number of clinics were engaging in various questionable practices, including: (1) providing both family planning services and separately funded, abortion-related activities at a single site; (2) providing family planning counseling that did not present alternatives to abortion; (3) engaging in referral practices that went beyond the HHS referral policy; (4) providing literature that promoted abortion as a back-up method of family planning; and (5) engaging in abortion lobbying activities. See GAO, *Restrictions on Abortion and Lobbying Activities in Family Planning Programs Need Clarification* (Sept. 24, 1982) [hereinafter GAO Report] (J.A. 82-136). See 53 Fed. Reg. 2924 (1988) (describing practices). The GAO concluded that HHS "needs to set forth clear guidance on the scope of abortion restrictions in its title X program regulations and guidelines" and "needs to make its guidance [with respect to abortion advocacy] more specific and consistent." J.A. 82. See also J.A. 88, 110-111, 120-122, 129. For its part, the OIG found, based on audits of 32 Title X projects, that HHS's failure to provide specific program guidance as to the scope of Title X's abortion restriction had created confusion about what activities were proscribed and had led to variations in grantee practices. 53 Fed. Reg. 2924 (1988). Like GAO, the OIG recommended that HHS "give more specific, formalized direction to programs about the extent of prohibition on abortion as a method of family planning." *Id.* at 2923-2924.

[3] See U.S. Dep't of Health and Human Services, *Program Guidelines for Project Grants for Family Planning Services* § 8.6 (1981) (Pet. App. 71a); U.S. Dep't of Health, Educ. & Welfare, *Program Guidelines for Project Grants for Family Planning Services* (1976) (Pet. App. 72a). An HHS internal memorandum from this period explains:

> This office has traditionally taken the view that § 1008 not only prohibits the provision by Title X grantees of abortion as a method of family planning as part of the Title X-supported program, but also prohibits activities which promote or encourage the use of abortion as a method of family planning by the Title X-supported program. Under this view, the provision of information concerning abortion services, mere referral of an individual to another provider of services for an abortion, and the collection of statistical data and information regarding abortion are not considered to be proscribed by § 1008. The provision of "pregnancy counseling" in the sense of encouraging persons to obtain abortions and the provision of transportation to persons to enable them to obtain abortions, on the other hand, are considered to be proscribed by § 1008. The test to be applied, then, appears to be whether the immediate effect of the activity is to encourage or promote the use of abortion as a method of family planning.

Memorandum from Carol C. Conrad, Office of the General Counsel, Dep't of Health, Educ. & Welfare, to Elsie Sullivan, Ass't for Information and Education, Office of Family Planning, BCHS (Apr. 14, 1978) (footnotes omitted) (J.A. 56-57). See Pet. App. 23a, 42a-43a. Petitioners' description of these prior policies as "having no bearing on speech and information between a doctor or counselor and her patient" (Rust Br. 2) is thus clearly wrong.

On September 1, 1987, the Secretary of HHS published a notice of proposed rulemaking to clarify the scope of Section 1008's prohibition. See 52 Fed. Reg. 33,210 (1987). The notice recited the GAO and OIG findings, proposed new regulations responding to those findings, and invited public comment. The resulting comments confirmed the GAO and OIG determinations that the Secretary's past policies had provided ineffective guidance to Title X grantees:

> Many comments argued that the practice o[f] nondirective counseling has been the subject of widespread abuse, with many providers foregoing [*sic*] any balanced discussion of options in favor of pressuring women, particularly teenagers, into obtaining abortions. Numerous comments were received from women who said that they were never presented with any favorable or neutral information on any other option. Many of these commenters specifically mentioned experiences with particular Title X grantees or projects.

53 Fed. Reg. 2924 (1988). See also *id.* at 2924-2925 (citing and quoting comments).

The Secretary accordingly adopted the regulations at issue here to resolve the ongoing uncertainty and confusion concern-

ing the use of Title X funds; to prevent the abuses that the GAO, the OIG, and public comments had documented; and to effectuate more faithfully the underlying congressional policy, embodied in Section 1008, against the use of Title X funds in any way to encourage or promote abortion. See 53 Fed. Reg. 2922 (1988). The regulations first clarify, through a definition of the term "family planning" (42 C.F.R. 59.2), that Congress intended Title X funds to "be used only to support *preventive* family planning services" (H.R. Conf. Rep. No. 1667, *supra*, at 8 (emphasis added)).[4] The regulations then address the three major sources of GAO and OIG concern: (a) abortion counseling and referral (42 C.F.R. 59.8); (b) program integrity (42 C.F.R. 59.9); and (c) abortion advocacy (42 C.F.R. 59.10).

a. *Abortion Counseling and Referral*. The Secretary determined that allowing Title X projects to engage in abortion counseling and referral is inconsistent with Title X's limited function of funding *pre*-pregnancy family planning services and with HHS's longstanding policy of forbidding Title X funded activities that promote or encourage abortion. See 52 Fed. Reg. 33,211 (1987). Section 59.8 of the new regulations accordingly specifies that "[a] Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." 42 C.F.R. 59.8(a)(1). Furthermore, if "a client served

[4] The regulations state:

> "*Family planning*" means the process of establishing objectives for the number and spacing of one's children and selecting the means by which those objectives may be achieved. These means include a broad range of acceptable and effective methods and services to limit or enhance fertility, including contraceptive methods (including natural family planning and abstinence) and the management of infertility (including adoption). Family planning services includes [*sic*] preconceptional counseling, education, and general reproductive health care (including diagnosis and treatment of infections which threaten reproductive capability). Family planning does not include pregnancy care (including obstetric or prenatal care). As required by section 1008 of the Act, abortion may not be included as a method of family planning in the Title X project. Family planning, as supported under this subpart, should reduce the incidence of abortion.

42 C.F.R. 59.2.

by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child." 42 C.F.R. 59.8(a)(2). In that situation, the Title X project's preventive family planning services are no longer apposite, and the project must direct the client to a prenatal care facility that, unlike a Title X project, can provide pregnancy counseling and obstetric or other pregnancy-related care.[5]

Section 59.8 does not prohibit referrals to prenatal care facilities that also provide abortions, nor does it limit in any way the information or services that a referred client might receive at a prenatal care facility. That facility may provide the woman with counseling about abortion and, indeed, may perform an abortion. Section 59.8 provides, however, that

> [a] Title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by "steering"clients to providers who offer abortion as a method of family planning.

42 C.F.R. 59.8(a)(3). The new regulations do not prevent a Title X project from advising its clients that it provides only preventive family planning and infertility services—*i.e.*, that it is concerned with *pre*-pregnancy planning only—and that it does not assist in procuring abortions and abortion services.

b. *Program Integrity*. The Secretary also determined that new requirements were necessary to strengthen HHS's existing

[5] The Title X project must also provide the client "with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept." If emergency care is required, however, the project must "refer the client immediately to an appropriate provider of emergency medical services," even when such emergency services normally would involve an abortion. See 42 C.F.R. 59.8(a)(2) and (b)(2).

policy requiring that if a Title X grantee provides abortion services, those services must be "separate and distinct" from a Title X funded project. See 52 Fed. Reg. 33,212 (1987).[6] Section 59.9 therefore provides that a Title X grantee must structure its Title X project "so that it is physically and financially separate" from other parts of a grantee's organization that might provide abortion services. 42 C.F.R. 59.9. Section 59.9 states that the Secretary will make a case-by-case determination of "objective integrity and independence" based upon (but not limited to) factors such as (a) the existence of separate accounting records; (b) the degree of separation from facilities (*e.g.*, treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities; (c) the existence of separate personnel; and (d) the extent to which signs and other forms of identification of the Title X project are present and signs and material promoting abortion are absent. 42 C.F.R. 59.9.

c. *Abortion Advocacy*. Finally, the Secretary concluded that allowing Title X projects to engage in abortion advocacy is inconsistent with congressional intent and HHS's longstanding policy of forbidding Title X funded activities that promote or encourage abortion. See 52 Fed. Reg. 33,212 (1987). Section 59.10 accordingly states that "[a] Title X project may not encourage, promote or advocate abortion as a method of family planning." 42 C.F.R. 59.10(a).[7] The regulation does not prevent

[6] HHS regulations are directed at achieving the specific and narrow purpose of program integrity and thus do not prevent Title X grant recipients from providing abortion-related services in programs that do not utilize Title X project funds. See note 29, *infra* (explaining the scope of Title X project funds).

[7] The regulation sets forth several specific examples of prohibited advocacy activities: (1) lobbying for the passage of legislation to increase in any way the availability of abortions as a method of family planning; (2) providing speakers to promote the use of abortion as a method of family planning; (3) paying dues to any group that as a significant part of its activities advocates abortion as a method of family planning; (4) using legal action to make abortion available in any way as a method of family planning; and (5) developing or disseminating in any way materials (including printed matter and audiovisual materials) advocating abortion as a method of family planning. 42 C.F.R. 59.10(a). The Secretary interprets the statute and the regulations neutrally as barring all forms of abortion-related advocacy, whether in favor of, or opposed to, abortion. With the exception of item 3, these activities were considered to be prohibited under HHS's prior policies. See 53 Fed. Reg. 2942.

a Title X grantee (as distinct from the Title X *project* run by the grantee) from engaging in abortion-related advocacy.

The Secretary explained at length that the three basic conditions embodied in these regulations are necessary to assure that grantees comply with Title X in administering their federally funded Title X projects and to facilitate HHS monitoring of compliance. 53 Fed. Reg. 2923-2943 (1988); 52 Fed. Reg. 33,210-33,213 (1987).

3. Petitioners initiated these consolidated actions against the Secretary to challenge the facial validity of the regulations. Petitioners argued that the regulations are inconsistent with Title X, including Section 1008's restriction on the use of funds "in programs where abortion is a method of family planning" (42 U.S.C. 300a-6), and that the regulations violate the First and Fifth Amendments. The district court granted summary judgment for the Secretary, rejecting all of petitioners' challenges to the regulations. Pet. App. 9a-32a. The court of appeals affirmed. *Id.* at 35a-67a.

The court of appeals first addressed petitioners' contention that Title X does not authorize the regulations in question. Pet. App. 46a-53a. It rejected as "highly strained" petitioners' argument that Section 1008 forbids Title X projects only from performing abortions. *Id.* at 47a. The court explained that a "principal function" of Title X projects is counseling and that a project that counsels clients concerning abortion includes abortion among its "methods of family planning." *Ibid.* Thus, "the natural construction of Section 1008 is that the term 'method of family planning' includes counseling concerning abortion." *Ibid.*

The court found this construction consistent with Title X's legislative history. It observed that petitioners' "contrary view of the legislative history is based entirely on highly generalized

statements about the expansive scope of family planning services" (Pet. App. 48a) that "do not specifically mention counseling concerning abortion as an intended service of Title X projects" and that "surely cannot be read to trump a section of the statute that specifically excludes it" (*id.* at 49a). The court found post-enactment legislative history relied upon by petitioners to be "unenlightening." *Id.* at 49a-50a.

The court also rejected petitioners' argument that the Secretary is bound by prior administrative constructions of the statute. Pet. App. 50a-53a. The court explained that an agency is entitled to "consider varying interpretations and the wisdom of its policy on a continuing basis" (*id.* at 51a). Here, "the Secretary has concluded that prior policy failed to implement the statute" and properly revised that policy through new regulations that "are fully consistent" with the statute. *Ibid.*

The court of appeals likewise rejected petitioners' Fifth Amendment challenge. Pet. App. 53a-56a. The court explained that this Court's recent decision in *Webster* v. *Reproductive Health Services*, 109 S. Ct. 3040 (1989), "clearly refutes" petitioners' contention that the regulations impermissibly burden the right discerned in *Roe* v. *Wade*, 410 U.S. 113 (1973), to obtain an abortion. Pet. App. 55a. The court of appeals observed that the regulations, which simply prohibit federal funding of abortion counseling, referral, or advocacy, do not place any "affirmative legal barriers to access to abortion." *Ibid.*

Finally, the court of appeals rejected petitioners' contention that the First Amendment prohibits the government from limiting the use of federal funds for abortion counseling, referral, or advocacy. The court explained that, under *Regan* v. *Taxation With Representation* (*TWR*), 461 U.S. 540 (1983), the government has no obligation to subsidize even the "exercise of fundamental rights," including "speech rights." Pet. App. 56a. Moreover, the court noted, the regulations do not "condition receipt of a benefit on the relinquishment of constitutional rights." *Id.* at 57a. Grantees and their employees "remain free to say whatever they wish about abortion outside the Title X project." *Ibid.* The court also held that the regulations "do not facially discriminate on the basis of the viewpoint of the speech

involved." *Id.* at 59a. "Argumentation pro or con as to the advisability of an abortion for a particular woman is neither required nor authorized. * * * Nor do the regulations in any way suggest that Title X funds may be used for public anti-abortion advocacy." *Ibid.*

Judge Cardomone concurred in the majority opinion and wrote a separate opinion. Pet. App. 60a-62a. Judge Kearse dissented in part. *Id.* at 62a-67a. She concluded that the new abortion counseling and referral regulations are arbitrary and capricious and also violate the First and Fifth Amendments.[8]

SUMMARY OF ARGUMENT

Petitioners contend that the Secretary's regulations violate the constitutional rights of Title X participants and are inconsistent with the statute. The court of appeals correctly rejected these arguments. Petitioners' constitutional arguments, disrobed of their rhetoric, rest on the assertion that the government is obligated to subsidize abortion-related services. Their statutory arguments, which the court of appeals aptly described as "highly strained" (Pet. App. 47a), are inconsistent with Title X's language, purpose, and legislative history.

Petitioners incorrectly contend that the Secretary's regulations, which limit Title X projects to the provision of prepregnancy family planning services, burden the qualified right announced in *Roe* v. *Wade*, 410 U.S. 713 (1973), to choose to have an abortion. While under *Roe* the government may not prohibit a woman from choosing to have a first trimester abor-

[8] The Court of Appeals for the First Circuit has ruled that the Title X regulations are unconstitutional. See *Massachusetts* v. *Secretary of HHS*, 899 F.2d 53 (1st Cir. 1989) (en banc), petition for cert. pending, No. 89-1929 (filed June 8, 1990). But see 899 F.2d at 79 (Torruella, J., dissenting). In addition, the government has appealed two district court decisions that have invalidated the regulations. See *West Virginia Ass'n of Community Health Centers, Inc.* v. *Sullivan*, 737 F. Supp. 929 (S.D. W. Va. 1990) (partially invalidating the regulations on constitutional grounds), appeal pending, No. 90-2366 (4th Cir.); *Planned Parenthood Fed'n* v. *Bowen*, 680 F. Supp. 1465 (D. Colo. 1988) (invalidating the regulations on statutory and constitutional grounds), appeal pending, No. 88-2251 (10th Cir.).

tion, this Court has repeatedly held that the government is not obligated to provide the means to exercise any such right. Thus, the government need not finance the provision of information about abortion, whether the information is provided in the form of abortion counseling, referral, or advocacy. Petitioners' contention that the Secretary's regulations require Title X projects to "mislead" their clients is categorically false. The regulations do not permit the project to provide abortion counseling or referral, but they do not prevent the project from informing its clients that the project provides only pre-pregnancy family planning services and that a client must go elsewhere for post-pregnancy counseling and care.

Petitioners are also mistaken in contending that the Secretary's regulations violate the First Amendment rights of Title X participants. The government can selectively fund a program to encourage certain activities that are in the public interest without providing funds to encourage other activities that a private individual wishes to promote. In this case, the government has made a decision to provide federal subsidies for pre-pregnancy family planning and infertility services, but it has decided not to fund activities that "promote or encourage" abortion. The government regulations limit the *Title X project's* activities, but they do not prevent a Title X grant recipient, its employees, or its clients from advocating and pursuing other objectives outside of the Title X project itself.

Finally, petitioners' contention that Title X does not authorize the Secretary's regulations is without merit. As the court of appeals explained, the Secretary's regulations are consistent with the language and history of Title X, which make clear that federal funding is not available for programs "where abortion is a method of family planning." § 1008, 42 U.S.C. 300a-6. HHS has consistently taken the position that Title X funds are not available to fund projects that "promote or encourage" abortion. The Secretary's regulations, which clarify the scope of this restriction, are reasonable and necessary to assure that Title X funds are applied only to those activities that Congress wished to promote.

ARGUMENT

Petitioners challenge the Secretary's Title X regulations on both constitutional and statutory grounds. Since petitioners place greatest emphasis on their constitutional arguments (see Rust Br. 13-39, N.Y. Br. 31-49), we address those contentions first and show, as the court of appeals held, that the regulations do not impermissibly burden the Fifth Amendment rights of Title X project clients or the First Amendment rights of Title X project participants. We then demonstrate, as the court of appeals also held, that the regulations properly implement the statute.

I. THE REGULATIONS DO NOT VIOLATE THE FIFTH AMENDMENT

Petitioners argue that the Secretary's regulations impermissibly burden the qualified right discerned in *Roe* v. *Wade*, 410 U.S. 113 (1973), to choose to have an abortion. See Rust Br. 31-36; N.Y. Br. 47-49. We continue to believe that *Roe* was wrongly decided and should be overruled. As more fully explained in our briefs, filed as amicus curiae, in *Hodgson* v. *Minnesota*, 110 S. Ct. 2926 (1990); *Webster* v. *Reproductive Health Services*, 109 S. Ct. 3040 (1989); *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); and *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983), the Court's conclusions in *Roe* that there is a fundamental right to an abortion and that government has no compelling interest in protecting prenatal human life throughout pregnancy find no support in the text, structure, or history of the Constitution. If *Roe* is overturned, petitioners' contention that the Title X regulations burden the right announced in *Roe* falls with it. But even under *Roe*'s strictures, the Title X regulations at issue do not violate due process.

This Court has repeatedly recognized that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Webster*, 109 S. Ct. at 3051 (quoting *DeShaney* v. *Winnebago County Dep't of Social Services*, 109 S. Ct. 998, 1003 (1989)). Thus, while under *Roe* the government may not prohibit a woman, during the first trimester, from choosing to have an abortion, the government is not obligated

to provide the means to exercise any such right. See *Webster*, 109 S. Ct. at 3051-3053; *Harris* v. *McRae*, 448 U.S. 297, 312-318 (1980); *Poelker* v. *Doe*, 432 U.S. 519, 521 (1977); *Maher* v. *Roe*, 432 U.S. 464, 473-474 (1977). Indeed, as this Court has expressly stated, the government "may 'make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.'" *Webster*, 109 S. Ct. at 3052 (quoting *Maher*, 432 U.S. at 474). *Webster* made it clear that

> the State's decision * * * to use public facilities and staff to encourage childbirth over abortion "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy." *McRae*, 448 U.S., at 315. Just as Congress' refusal to fund abortions in *McRae* left "an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all," *id.* at 317, Missouri's refusal to allow public employees to perform abortions in public hospitals leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all.

109 S. Ct. at 3052 (parallel citations omitted).

This Court's decisions in *Webster*, *McRae*, *Poelker*, and *Maher* establish that the government need not finance abortions or provide public facilities and personnel for their performance. By the same token, the government need not finance the provision of information *about* abortion, whether that information is provided in the form of counseling, referral, or advocacy. Even assuming what we do not concede, what has not been shown, and what is hardly intuitive—that a woman may encounter difficulty in obtaining abortion information if Title X projects do not provide abortion counseling, referral, or advocacy—that difficulty is not a government-created obstacle. The woman is in precisely the same position she would occupy if Congress had not enacted Title X. See *McRae*, 448 U.S. at 316. She "suffers no disadvantage as a consequence" of the Secretary's Title X regulations, because "she continues as before to be dependent on private sources for the service she desires." *Maher*, 432 U.S. at 474. The government's choice not to have its funds spent on

abortion counseling, referral, or advocacy is simply not an infringement on any right to engage in those activities. As this Court explained in *McRae*, 448 U.S. at 317 n.19, "refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." [9]

Petitioners contend, however, that the regulations place an obstacle in the path of a woman's choice to have an abortion by requiring Title X projects to "misinform" and "mislead" their clients concerning the scope of available medical services. See Rust Br. 31-32, 34, 36; N.Y. Br. 48. Not so. The regulations state that a Title X project can provide only certain types of family planning services, but they in no wise prevent the project from acknowledging that fact. To the contrary, the Title X regulations leave a participating project and its employees entirely free to advise clients that the project provides a service but only a limited service: it provides only pre-pregnancy services, and clients should go elsewhere if they desire *either* abortion-related counseling and services *or* obstetric care in carrying the child to term. Similarly, a Title X project is entirely free to advise those who are pregnant that the project's referral list of prenatal care facilities (see 42 C.F.R. 59.8(a)(2)) includes providers that promote the welfare of the mother and the unborn child and does not include entities whose principal business is the provision of abortions. Thus, the regulations do not require Title X projects to deceive their clients.[10] Petitioners' contention

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[9] Indeed, the Secretary's Title X regulations have far less practical effect than the state action upheld in *Webster*, which prevented women from obtaining abortions at a hospital "where, in 1985, 97 percent of all Missouri hospital abortions at 16 weeks or later were performed." *Webster*, 109 S. Ct. at 3068 n.1 (Blackmun, J., dissenting). The dissenting opinion in *Webster* concluded that *McRae* and *Maher* were inapposite because the State, in the dissent's view, "has taken affirmative steps to assure that abortions are not performed by *private* physicians in *private* institutions." *Ibid.* That certainly is not the case here.

[10] There is no evidence, or reason to believe, that Title X projects will fail to acknowledge the limited scope of their services. And there is no constitutional requirement that the regulations explicitly guard against the unlikely prospect that Title X projects will fail to provide that information. Cf. *Bowen* v. *Kendrick*, 487 U.S. 589, 615 (1988) ("we do not think that the absence of an ex-

that the regulations require "[m]andatory distortion of relevant medical information" (Rust Br. 31-32) is categorically false.[11]

Petitioners are also incorrect in asserting that the regulations intrude in an unconstitutional manner on the woman's relationship with her physician. See Rust Br. 32-33; N.Y. Br. 47, 48-49. Petitioners rely on *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) and *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983), which invalidated laws designed to regulate the information that *any* physician practicing in a State could provide to *any* patient concerning abortion-related matters.[12] The Title

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press limitation on the use of federal funds for religious purposes [in the Adolescent Family Life Act] means that the statute, on its face, has the primary effect of advancing religion"). In any event, the regulations are not subject to facial constitutional attack based on the anticipation of an implausible event. See *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) (law or regulation cannot be held unconstitutional on its face unless it is incapable of valid application); *Roemer* v. *Maryland Board of Public Works*, 426 U.S. 736, 761 (1976) ("It has not been this Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds.").

[11] Ironically, petitioners use selective placement of ellipses to support their claim that the regulations require Title X projects to mislead their clients. They contend that a "negative message about abortion will be all that is conveyed" because the regulations require referral to facilities that "promote the 'welfare of . . . [the] unborn child,' § 59.8(a) (2), while providing 'information necessary to protect the health of . . . [the] unborn child,' *id.*" Rust Br. 16 (ellipses in original). The regulations require that the referral list include facilities that promote the welfare of *both* the "mother and unborn child." See 42 C.F.R. 59.8(a) (2). Presumably, a woman in need of pregnancy counseling has not decided whether or not to have an abortion. During this interim period of indecision, it is completely reasonable that the health care professional's referral should preserve both the mother's health and her option to carry the child to term.

[12] See *Thornburgh*, 476 U.S. at 758-771 (invalidating informed consent requirements applicable to all physicians practicing in the State); *Akron*, 462 U.S. at 442-449 (invalidating affirmative disclosure obligations placed upon all physicians practicing in the State). As petitioners acknowledge (N.Y. Br. 32 n.28), "[m]uch, if not most counseling of pregnant women in Title X clinics is performed by health professionals other than physicians." See also J.A. 114 (GAO Report). As we explain (pp. 24-27, *infra*), the Title X regulations do not violate the First Amendment rights of those health care professionals.

X regulations, by contrast, affect only those women who elect to participate in a federally subsidized program designed to provide only pre-pregnancy family planning and infertility services. The regulations do not prevent a woman from obtaining abortion information; she simply must seek it from a source other than a Title X project. As this Court has stated, "the critical factor is whether she receives the necesssary information and counseling from a qualified person, not the identity of the person from whom she obtains it." See *Akron*, 462 U.S. at 448. Thus, Title X and the Secretary's regulations do not conflict with *Akron* and *Thornburgh*. Rather, they merely define the scope of the services that a federally subsidized Title X health care professional may provide in the context of a specific, limited program.

Nor do the regulations violate due process by unduly delaying the exercise of rights under *Roe*. See Rust Br. 34; N.Y. Br. 48. No one is required to visit a Title X project before seeking an abortion or abortion-related counseling; any "delay" occasioned by such a visit is caused by the volitional act of the individual rather than the operation of law.[13] The client can leave at once

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[13] Compare *Ohio* v. *Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2981 (1990) (holding that a State may prohibit the performance of an abortion on an unmarried, unemancipated minor unless the physician provides timely notice to one of the minor's parents or a juvenile court issues an order authorizing a minor to consent, which could take up to 22 days); *Hodgson* v. *Minnesota*, 110 S. Ct. 2926 (1990) (holding that a State may prohibit the performance of an abortion on a minor until at least 48 hours after both of her parents have been notified, provided that the minor also may obtain a judicial "bypass" around the notice requirement); *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476, 491 n.16 (1983) (holding that a state parental consent statute containing a judicial bypass procedure that could require 17 calendar days plus a sufficient time for deliberation and decisionmaking at both the trial and appellate levels did not deny a woman the "effective opportunity for an abortion" (see *Ohio*, 110 S. Ct. at 2981)). Any delay here would not exceed the delay that a woman would experience if she mistakenly sought an abortion at a Missouri public hospital (see *Webster*, 109 S. Ct. 3040). The minimal delay that a woman might encounter is necessary to achieve the government's legitimate interest in assuring that Title X projects do not

upon learning that the Title X project does not provide abortion-related counseling or referral, if that is her wish, and immediately seek those services elsewhere. Thus, the regulations do not deny, or even meaningfully delay, "the effective opportunity for an abortion." See *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476, 491 n.16 (1983). Indeed, the delay generally should be no greater than the delay that would result if, as in the past, the Title X project provided non-directive abortion counseling but required the client to go elsewhere to obtain an abortion. See 53 Fed. Reg. at 2937-2938. Cf. *Hodgson* v. *Minnesota*, 110 U.S. 2926, 2944 (1990) (opinion of Justice Stevens) (a statutory "48-hour waiting period may run concurrently with the time necessary to make an appointment for the procedure, thus resulting in little or no delay").[14]

become associated with controversial family planning techniques, such as abortion, that might jeopardize public support for *any* family planning services. See note 24, *infra*. Moreover, the woman, through her own efforts, could minimize or eliminate the delay. Compare *Akron*, 462 U.S. at 450-451 (invalidating, as "arbitrary and inflexible," a mandatory 24-hour waiting period for abortions).

[14] For related reasons, petitioners err in contending that the new regulations will unduly increase the cost of a woman's exercise of her rights. See Rust Br. 34-35; N.Y. Br. 48 n.54. An individual who does not want the limited services offered by a Title X project can leave before incurring any costs. In addition, the sliding-scale fee schedules that most Title X programs use, which entitle indigent women generally to receive Title X services without charge (see 42 C.F.R. 59.5(a) (6)-(8)), and the existence of other federally funded programs (including but not limited to Medicaid) further diminish the possibility that the cost of Title X services would ever increase the cost of obtaining abortion-related services to constitutionally significant levels. See *Webster*, 109 S. Ct. at 3052 (rejecting argument that state law forbidding use of public facilities or employees for performing abortions would unconstitutionally "increase the cost of obtaining an abortion"); *Planned Parenthood Ass'n*, 462 U.S. at 490 (upholding state requirement that a pathologist examine tissue samples after every abortion, at the estimated cost of $19.40 per abortion, because "in light of the substantial benefits that a pathologist's examination can have, this small cost clearly is justified").

II. THE REGULATIONS DO NOT VIOLATE THE FIRST AMENDMENT

Petitioners further argue that the regulations violate the "free speech rights of private health care organizations that receive Title X funds, of their staff, and of their patients." Rust Br. 13; see N.Y. Br. 32. Petitioners specifically contend that the regulations impermissibly "impose viewpoint-discriminatory conditions on government subsidies" and "penaliz[e] speech funded with non-Title X monies." Rust Br. 14, 24; see N.Y. Br. 32, 41, 42. Petitioners' arguments are incorrect and reflect a mistaken understanding of the First Amendment's application to the Title X program.

1. This Court has repeatedly rejected the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State." *Regan* v. *Taxation With Representation* (*TWR*), 461 U.S. 540, 546 (1983) (quoting *Cammarano* v. *United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring)). See also *Lyng* v. *International Union*, 485 U.S. 360, 369 (1988); *Buckley* v. *Valeo*, 424 U.S. 1, 93-95 (1976). Thus, the government can selectively fund a program that "encourage[s] actions deemed to be in the public interest" (*Maher*, 432 U.S. at 476) without providing funding to encourage other actions that a private individual wishes to promote. See *id.* at 476-477.[15] The Court's reasoning here closely follows its reasoning in the Fifth Amendment context (pp. 13-15, *supra*):

> "although government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation."

TWR, 461 U.S. at 549-550 (brackets and ellipsis in original, quoting *McRae*, 448 U.S. at 316).[16]

[15] As Judge Cudahy succinctly stated that matter, the Constitution "does not engraft an 'equal time' requirement onto the dispensation of state funds for the encouragement of matters reflecting a legitimate state interest." *Planned Parenthood Ass'n* v. *Kempiners*, 700 F.2d 1115, 1128 (7th Cir. 1983) (opinion of Cudahy, J.).

[16] See also, *e.g.*, *Maher*, 432 U.S. at 476 ("Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's

The Title X regulations are consistent with these principles. The government has made a decision to provide federal subsidies for a concededly valid purpose: the promotion of prepregnancy family planning and infertility services for low-income individuals. But the government has decided against funding actions to "promote or encourage" abortion, whether those actions take the form of abortion counseling, referral, or advocacy. The government's decision against funding the exercise of what might amount to "speech" concerning abortion imposes no affirmative obstacle on the person who is free to engage in such speech without federal funding, and therefore does not infringe any constitutional right. See *TWR*, 461 U.S. at 549.

Petitioners argue that the Court's reasoning in *TWR*, *McRae*, and *Maher* is inapposite because the Title X regulations subject Title X grant recipients, their employees, and their clients to discriminatory treatment "on the basis of viewpoint." Rust Br. 15; N.Y. Br. 32. They contend—based on this Court's decisions in *Arkansas Writers' Project* v. *Ragland*, 481 U.S. 221 (1987), and *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), and dicta in *TWR*, 461 U.S. at 548—that the regulations are accordingly unlawful. Rust Br. 17; see N.Y Br. 38-39. Petitioners are mistaken as to both their premise and the import of those cases. The regulations governing how federal money is spent do not place impermissible burdens on the expressive conduct of grantees, employees, or clients.

a. *Grant Recipients*. Petitioners are manifestly wrong in suggesting that the Title X regulations restrict the speech of Title X grant recipients. A Title X *grantee* and a Title X *project* are two distinct entities. The grantee, which is normally a health care organization (Rust Br. 13), may receive funds from a variety of sources for a variety of purposes. See Rust Br. 3 n.5.

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power to encourage actions deemed to be in the public interest is necessarily far broader."). Cf. *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) ("the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government") (quoting *Sherbert* v. *Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)).

However, it receives Title X funds for the specific and limited purpose of establishing and operating a Title X project (§ 1001(a), 42 U.S.C. 300(a)). The Secretary's regulations govern the scope of the *project's* activities.[17] The grantee, however, can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy. The grantee is simply required to conduct those activities through programs that are separate and independent from the project that receives federal funds. See 42 C.F.R. 59.9.

The Court's decisions in *Arkansas Writers' Project* and *FCC*, and the dicta in *TWR*, all involve restrictions imposed on the *recipient* of the subsidy rather than on the specific subsidized *service*. Those are two quite different forms of restrictions.[18] The Court's decision in *FCC* illustrates the importance of the distinction. In *FCC*, the Court invalidated a federal law providing that noncommercial television and radio stations that re-

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[17] See 42 C.F.R. 59.8 ("A *Title X project* may not provide counseling concerning the use of abortion as a method of family planning.") (emphasis added); 42 C.F.R. 59.9 ("A *Title X project* must be organized so that it is physically and financially separate" from prohibited activities.) (emphasis added); 42 C.F.R. 59.10 ("A *Title X project* may not encourage, promote, or advocate abortion as a method of family planning.") (emphasis added).

[18] *Arkansas Writers' Project*, which involves the special problem of "a discriminatory tax on the press" (481 U.S. at 227), obviously has little relevance here. See *id.* at 228 ("selective taxation of the press * * * poses a particular danger of abuse by the State"). In any event, it involves a situation where the State provided publishers with a subsidy (a sales tax exemption) based on the general identity of their publications' audience (*e.g.*, religious, professional, or trade magazines) rather than a subsidy to produce a particular article. *Id.* at 223-225. As we explain in the text, *FCC* is likewise distinguishable; the government restricted a subsidized broadcaster's expression rather than the content of a particular subsidized broadcast. 468 U.S. at 400. Similarly, the Court's statement in *TWR* that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'aim at the suppression of dangerous ideas' " (461 U.S. at 548) describes *Speiser* v. *Randall*, 357 U.S. 513 (1958), where California denied a tax exemption to persons who refused to sign a loyalty oath. There as well the government imposed a limitation directly on the grant recipient's freedom of expression rather than on the content of a particular subsidized product or service.

ceive federal grants may not "engage in editorializing." 468 U.S. at 374-402. In that case, the statute imposed a "content-based" restriction directly on the media grantee. In this case, by contrast, the government restrictions are not imposed on the grantee, but rather on the specific Title X project that the grantee produces. The facts in *FCC* would bear some similarity to the present case if the government had offered the broadcaster a federal grant to produce a specific broadcast *program*, subject to certain content-based conditions. But under *FCC*'s reasoning, such grants would be permissible because the station would be "able to segregate its activities according to the source of its funding." 468 U.S. at 400. Indeed, part of the very purpose of the regulations at issue here is to implement such segregation.[19]

More generally, the government is entitled to participate in public discourse. See *Block* v. *Meese*, 793 F.2d 1303, 1312-1314 (D.C. Cir.), cert. denied, 478 U.S. 1021 (1986). Indeed, petitioners acknowledge as much. Rust Br. 23; N.Y. Br. 39 n.40. For example, we submit that the government could offer a television station a grant to produce a documentary that discusses family planning techniques but does not provide abortion counseling, or otherwise promote, encourage, or advocate abortion. In that circumstance, the government is acting as a "participant in the marketplace of ideas" rather than as "a regulator of expression." The government's decision to enter the marketplace by "contracting out" the production of that message does not violate the First Amendment rights of the grantee who voluntarily decides to produce the program.[20] If the First Amendment allows the government to fund that broadcast program, which involves expressive conduct, it cer-

[19] The Court specifically explained that if the government permitted stations "to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid under the reasoning of [*TWR*]." 468 U.S. at 400.

[20] See L. Tribe, *American Constitutional Law* 783 (2d ed. 1988) ("When government adds its own voice to the dialogue, and perhaps also when it subsidizes the voices of its surrogates, it is not subject to the usual form or level of first amendment scrutiny.").

tainly must permit the government to fund the services themselves.[21]

Indeed, the Secretary's regulations can be said to restrict a grant recipient's freedom of expression in only the most attenuated way: grantees must conduct any abortion counseling and advocacy through programs that are separate and distinct from the federally funded program. See 42 C.F.R. 59.9. That restriction, which is designed to assure "program integrity" (*ibid.*), plainly is permissible. This Court has recognized that the government's power to spend government funds for public purposes includes an ancillary power to assure that those funds are properly applied to the prescribed use.[22] The Secretary's program integrity regulation, which states that the "Title X project must be organized so that it is physically and financially separate" from prohibited activities (43 C.F.R. 59.9(a)), is a reasonable condition on the receipt of Title X funds. The regulation is specifically designed to assure that Title X grantees do not mix federally subsidized activities with non-subsidized activities in a manner that results in, or creates the appearance of, the government funding abortion as a method of family planning. The regulation, which is applied on a case-by-case basis (see p. 8, *supra*), is narrowly tailored to assure that Title X

[21] Contrary to petitioners' suggestion, the Secretary's regulations are content-based rather than viewpoint-based. As the court of appeals explained, they prohibit all discussion of abortion "pro or con." Pet. App. 59a. Even if the regulations did impose a viewpoint restriction, the analysis would be much the same. The government is entitled to have a viewpoint when it participates in public discourse. Moreover, as this Court has already held, it "may 'make a value judgment favoring childbirth over abortion and . . . implement that judgment through the allocation of public funds.' " *Webster*, 109 S. Ct. 3052 (quoting *Maher*, 432 U.S. at 474).

[22] See *South Dakota* v. *Dole*, 483 U.S. 203, 207-209 (1987) (government may withhold federal highway funds from States that fail to raise the drinking age to 21 because that failure relates to highway safety and, hence, the proper use of the federal subsidy); *Buckley* v. *Valeo*, 424 U.S. 1, 99 (1976) (government's power to restrict use of public campaign funds includes the power to limit private campaign expenditures of those who receive public funds); see also *Cammarano* v. *United States*, 358 U.S. 498, 513 (1959); *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 295 (1958).

funds are expended for the intended government purposes.[23] The restriction bears a rational and close relationship to the purpose of the subsidy.[24]

b. *Employees of Grant Recipients*. Similarly, petitioners are wrong in arguing that the Secretary's regulations abridge the "free speech" rights of the grantee's "staff" (Rust Br. 13). The grantee may employ persons to carry out the Title X project's

[23] Moreover, because the program integrity regulation is applied on a flexible, case-by-case basis and takes into account a number of relevant facts and circumstances (see 42 C.F.R. 59.9), a facial challenge is particularly inappropriate. Petitioners' primary complaint—that the program integrity requirements will increase the grantees' costs in providing nonsubsidized services (Rust Br. 28-29; N.Y. Br. 42-43)—seems an especially unsuitable ground for a facial challenge. Indeed, that argument, on its face, suggests that petitioners are improperly using Title X monies to subsidize *non-Title X* services.

[24] See L. Tribe, *supra*, at 783 ("government's power to set the terms on which it offers a subsidy must be thought to include at least some power to restrict not only how that very subsidy is used but also certain other activities of the subsidized person or entity when those other activities bear a close enough relationship to use of the subsidy"). The government has a legitimate interest in assuring that Title X projects do not become associated with controversial family planning techniques that might jeopardize public support for *any* family planning services. Cf. *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 809 ("avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum"). Thus, the government may not only choose to include or exclude particular family planning methods, it may determine the necessary degree of separation between subsidized and unsubsidized activities. The line drawn will leave some parties dissatisfied, but that is an inevitable consequence of a program that funds some activities but not others. The fact remains that the "refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *McRae*, 448 U.S. at 317 n.19; *Maher*, 432 U.S. at 474-475 n.8. For example, the government has determined that Title X projects must counsel clients concerning various methods of birth control. As a result, Catholic organizations have largely refused to participate in the Title X program. No one suggests, however, that Title X therefore violates the First Amendment. Catholic organizations are still free to counsel against the use of any artificial method of birth control, and they are not "penalized" in any respect for doing so. They are simply unable to take part in a government-sponsored program with a different purpose. Like petitioners, they have no right to insist that the government fund the activities they wish to pursue simply because the government has decided to fund other activities.

functions, and those persons who voluntarily accept employment as Title X project personnel must perform duties in accordance with the Title X project's objects and purposes. The First Amendment does not entitle Title X project personnel to use the federal funds to defeat or compromise the objectives of the federally-funded project. The Secretary's regulations provide that the Title X project (and hence employees implementing the project's objectives) may not engage in abortion counseling and advocacy activities. The employees remain free, however, to pursue abortion-related activities, whether favoring or opposing abortion, when they are not acting under the auspices of the Title X project. 42 C.F.R. 59.10(b)(6) and (7). See Pet. App. 57a.

The Court's decision in *FCC* illustrates again the flaws in petitioners' challenge. As we explained above, the government's funding of a health care organization's Title X project would be analogous, for First Amendment purposes, to the government's funding of a television station's broadcast program that describes, in documentary form, pre-pregnancy preventive family planning techniques. The grant recipient's employees that implement the Title X project stand in the same shoes, for First Amendment purposes, as the broadcaster's employees who direct and prepare the documentary. It would be a curious extension of First Amendment principles to hold that the government's specification of the content of a federally funded documentary program violates the First Amendment rights of the program director or the health care professionals who choose to appear in the program. Yet, that is exactly what petitioners argue here.[25]

[25] Petitioners maintain that different rules should apply in the case of health care professionals because government "manipulation" of the "doctor-patient dialogue is particularly antithetical to the First Amendment." Rust Br. 20; see N.Y. Br. 32-34. Putting petitioners' rhetoric to one side, the health care professional's dialogue is restricted in only one limited sense. He is hired to provide only pre-pregnancy family planning and infertility services and must refer the client to *other* qualified health care professionals for post-pregnancy services. As the Secretary explained in promulgating the regulations, the referral of a client to another health care professional does not violate accepted

Simply put, the grant recipient, by accepting the federal subsidy, is obligated to comply with the conditions of the federal grant. The grant recipient's employees, as a matter of the employment relationship, are obligated to comply with the grant recipient's directions. Thus, any limitation on the employees' freedom of expression arises from their voluntary decision to enter a particular employment relationship. The government's federally funded grant may have enabled the grant recipient to offer job options that some may not wish to exercise, but it has not violated any First Amendment rights. See *TWR*, 461 U.S. at 549-550 (the government need not remove "obstacles in the path of a [person's] exercise of . . . freedom of [speech]" that are "not of its own creation" (brackets and ellipsis in original)).[26]

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medical ethics. See 53 Fed. Reg. 2932-2933 (1988). See also Br. of the Ass'n of American Physicians and Surgeons as Amicus Curiae in Support of Respondent; Br. of the American Academy of Medical Ethics as Amicus Curiae in Support of Respondent.

[26] Obviously, a private health care organization's employees cannot raise a First Amendment challenge to thwart an employer's attempt to convey (or not convey) a particular message. See *Hudgens* v. *NLRB*, 424 U.S. 507, 513 (1976) ("the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state"). The government, like other "participants in the marketplace of ideas," is also entitled to convey its message. Thus, even if this Court were to hold that the grant recipient's employees have a First Amendment claim against the federal government in this context, it should be fashioned in light of the government's right to convey, or not convey, a particular message. It is, of course, well settled that the government may condition government employment on the employee's willingness to abide by a wide variety of rules, including rules governing expressive activity, that are reasonably related to the government's interest as an employer. See, *e.g.*, *CSC* v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (Hatch Act). See also, *e.g.*, *O'Connor* v. *Ortega*, 480 U.S. 709, 723 (1987) (government may search employees' property under various circumstances in which searches of private citizens would not be allowed); *Connick* v. *Myers*, 461 U.S. 138, 147 (1983) (government employees may be fired for speech of merely private concern under various circumstances); *Kelley* v. *Johnson*, 425 U.S. 238, 247 (1976) (government may bar policemen from wearing long hair); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 616-617 (1973) (state law restriction on partisan political activities); *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947) (Hatch Act). Thus, while a government employee has a qualified right to participate, like other citizens, in public discourse, the First Amendment does not protect a public employee when he "speaks not as a citizen upon a matter of public concern, but instead as an employee upon matters only of personal interest." *Connick* v. *Myers*, 461 U.S. 138, 147 (1983). By the same token, when the government has provided federal funding to furnish a particular service, the employee hired to render that service has no First Amendment right to ignore the government's instructions, and certainly no First Amendment right to use the federal funds to provide services the government has elected not to provide.

In short, Title X project personnel do not have a First Amendment right to use Title X project resources for purposes that are inconsistent with Title X project objectives. They remain free, however, to pursue abortion-related activities, whether favoring or opposing abortion, on their time and with their own resources. The Secretary's regulations, which govern only the scope of *Title X project* activities (see note 17, *supra*), do not in any way restrict the activities of those persons acting as private individuals.

c. *Clients*. Petitioners are also incorrect in arguing that the Secretary's regulations abridge the "free speech" rights of Title X project clients. As we have explained (pp. 13-18, *supra*), the government's decision to deny funding for abortion counseling, referral, and advocacy does not violate a woman's exercise of rights under *Roe*. See *McRae*, 448 U.S. at 316. By the same token, it does not violate any conceivable First Amendment right. Again, the Court's decision in *FCC* demonstrates the fallacy in petitioner's reasoning. In our television analogy, a Title X project client occupies the same position, for First Amendment purposes, as the audience for the government-funded documentary. Petitioners argue, in essence, that the government's funding of a program that provides family planning information—but only on pre-pregnancy preventive techniques—violates the audience's First Amendment rights, because the audience wants to see a *different* program—one that includes *post*-pregnancy information. That extravagant contention finds no support in First Amendment law. To pursue the analogy, the person who wants to see that different program need only turn the channel. The government is not required to fund all the

possible programs an audience may wish to watch before it may fund any program.

As we observed above (p. 22, *supra*), petitioners acknowledge that the government may participate in the "marketplace of ideas." Rust Br. 23; N.Y. Br. 39 n.40. Having conceded that, petitioners cannot reasonably argue that the First Amendment prevents the government from providing family planning information.[27] Similarly, petitioners cannot reasonably contend that the First Amendment prevents the government from limiting the subject of its "program" to pre-pregnancy family planning techniques.[28] Petitioners do not contend that the government is conveying false information, and they are plainly incorrect in suggesting that the information is misleading. Their objection is simply that the government has failed to fund the message *they*

[27] See, *e.g.*, *First National Bank* v. *Belotti*, 435 U.S. 765, 777 (1978) ("[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source"). Particularly troublesome are petitioners' contentions that government speech is pernicious because clients might be influenced by what they think the government "disapproves" (N.Y. Br. 39) or that it might "distort the marketplace of ideas" (*id.* at 39 n.40). This analysis is at war with the basic values enshrined in our system of free expression. See Schauer, *Is Government Speech a Problem?*, 35 Stan. L. Rev. 373, 381-382 (1983) ("The assumption that government speech is likely to have a highly distorting effect on the trade in ideas is an assumption that goes not to the question of government speech but instead to the roots of the very idea of freedom of speech. * * * [A]s a long run strategy, we are willing to place some faith in the collective judgment of the people, and if this is the case, there seems to be no reason to assume that such collective judgment cannot appreciate government speech for what it is, in light of its source.").

[28] The First Amendment does not forbid the government from limiting a federal program to the purpose for which it was intended, as this Court's "non-public forum" cases make clear. See *Cornelius*, 473 U.S. at 806 (government entitled to limit federal fund-raising program to groups that serve program's goals); see also *United States* v. *Kokinda*, 110 S. Ct. 3115 (1990); *Perry Educ. Ass'n.* v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Madison School Dist.* v. *Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976). Cf. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 Cal. L. Rev. 1104, 1111 (1979) (First Amendment does not bar government from "supporting contemporary art over traditional art, ballet over modern dance, and family-oriented entertainment over adult entertainment").

wish to hear—an objection more properly addressed to the political branches responsible for funding decisions.

Ultimately, petitioners are left to argue that "the Title X program is often the only 'marketplace' in which low-income women can obtain medical counsel and information." Rust Br. 23-24. In effect, they contend that the government has "monopolized" the market for information about the availability of abortion. *Id.* at 24. The government, however, has expressly refused to enter that market: the regulations, by their terms, specifically provide that Title X projects "may not provide counseling concerning the use of abortion as a method of family planning." 42 C.F.R. 59.8(a)(1). Moreover, if it is a woman's income that constrains her from obtaining abortion information, we have simply returned to where we began: this Court has repeatedly rejected the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State." *TWR*, 461 U.S. at 546.

2. Petitioners also contend that the Secretary's regulations "violate the First Amendment by penalizing speech funded with non-Title X monies" (Rust Br. 24). They argue that since Title X requires that grant recipients contribute to the financing of Title X projects through the use of "matching funds" and grant-related income, the government restrictions on abortion counseling and advocacy "penalize" privately funded speech. See *id.* at 24-31; N.Y. Br. 42-46.[29]

[29] Title X project funds are defined to include "grant funds, grant-related income or matching funds." See 42 C.F.R. 59.2. Grant funds are those provided by the government; matching funds are the funds that must be supplied to the project by the grantee to cover the balance of estimated expenses. 42 C.F.R. 59.11(b). Grant-related income describes funds generated by the Title X project through, for example, patient charges or reimbursement from collateral sources. The terms of the grant specify how grant-related income may be used. The Secretary may specify that these funds be returned to the government, be applied as matching funds, or be used to expand the Title X project. See, *e.g.*, 45 C.F.R. 74.42(c)-(e). The grant recipient makes the decision whether to apply for federal funds and—subject to Title X and the Secretary's regulations—what activities to include in its application. Once a grant award is made, the federal funds support the allowable costs, on a proportional basis,

Petitioners' argument suffers from the same flaw that infects their previous assertions: the Secretary's regulations do not restrict the grant recipient's freedom of expression, they instead restrict the content of a specific, federally subsidized project. Our television analogy again is instructive. The government does not infringe the First Amendment rights of a television station by offering to subsidize a particular broadcast program even if the government conditions its subsidy on the station contributing matching or program-generated funds. The reason is self-evident: if the station objects to the use of its funds, then it can decline to produce the program. Similarly, if petitioners object to the use of their funds in a Title X project—for whatever reason—they can simply decline the subsidy.[30]

These principles are not novel. The government "may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.' " *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987). The government frequently requires, as was the case in *South Dakota*, that

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of all of the authorized activities described by the grantee in its application. There is no clear differentiation between federal and non-federal funds within a Title X project. See 45 C.F.R. 74.170.

[30] As we have explained (see note 18, *supra*), the Court's *FCC* decision dealt with a fundamentally different situation. The government offered grants to television stations on the condition that the grant recipient—the television station—would engage in no editorializing. Thus, the station would be "barred absolutely from all editorializing" because it "is not able to segregate its activities according to its source of funding." 468 U.S. at 400. Here, by contrast, the grant recipient suffers no limitation on *its* freedom of expression; it simply has an opportunity to operate a federally subsidized project under the conditions—both financial and programmatic—that the government has attached to the use of federal funds. Indeed, the regulations specifically contemplate the possibility that some Title X recipients will engage in abortion-related activities by means of complying with the program integrity requirements. 42 C.F.R. 59.9.

the recipient contribute matching funds (see 23 U.S.C. 123).[31] This Court has never suggested that a grant recipient who contributes matching funds is entitled to dictate the objectives or purposes of the federal program, or that the recipient is entitled to apply his contribution to the program to his personal objectives.[32] Indeed, in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the Court held, in response to First and Fifth Amendment challenges, that the government's power to restrict the use of public campaign funds includes the power to limit private campaign expenditures of those who receive public funds. See *id.* at 92-93, 99. The government's condition does not "penalize" speech in that context because the candidate has the option to decline the subsidy.[33] So too here: grant recipients can choose between accepting Title X funds—subject to the government's conditions that they provide matching funds and forgo abortion counseling or advocacy in the project—or financing their own unsubsidized program.[34] The First Amendment does not

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[31] The Court recently rejected an Establishment Clause challenge to a law that, like the Title X program, has a matching fund requirement and that restricts the awarding of grants for adolescent pregnancy programs to programs that do not provide abortions or abortion counseling or referral unless that adolescent and her parents request such referral. See *Bowen* v. *Kendrick*, 487 U.S. 589, 593-597 (1988) (describing the Adolescent Family Life Act, 42 U.S.C. 300z *et seq.*).

[32] The federal government generally provides the dominant share of funding, and thus has a strong interest in dictating program functions and objectives. For example, in the case of the Title X program, the federal government generally provides grants covering at least 90% of the estimated project costs. See 42 C.F.R. 59.11(b). Compare *FCC*, 468 U.S. at 400 ("a noncommercial educational station that receives only 1% of its overall income from CPB grants is barred absolutely from all editorializing").

[33] See L. Tribe, *supra*, at 783 ("it is understandable that the Court should have concluded, in *Buckley* v. *Valeo*, that a candidate may be forced to choose between running a campaign funded exclusively with a public grant and running a campaign funded solely with unlimited private spending").

[34] The government can attract matching funds because the programs it designs provide benefits that the participants are willing to support. Here, as elsewhere, an organization is free to choose not to participate in programs that do not serve its particular interests. See note 24, *supra*. See also *South Dakota*, 483 U.S. at 211 ("Till now the law has been guided by a robust common sense

prohibit the government from offering that choice.[35]

III. TITLE X AUTHORIZES THE SECRETARY'S REGULATIONS

Petitioners contend that this Court should invalidate the Secretary's regulations because "they are neither required nor expressly authorized by the language, structure, or history of Title X." Rust Br. 37. See N.Y. Br. 10-31. The court of appeals (like the district court) correctly rejected that argument, holding that "the language and history of Title X are fully consistent with the regulations challenged in the instant case." Pet. App. 51a. The other court of appeals that has addressed the question, the First Circuit, is largely in agreement with that determination.[36] We will show that the court below is correct, addressing,

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which assumes the freedom of the will as a working hypothesis in the solution of its problems." (quoting *Stewart Machine Co.* v. *Davis*, 301 U.S. 548, 590 (1937)).

[35] Petitioners also contend that the Secretary's regulations should be invalidated to avoid encountering the constitutional issues that petitioners have raised. N.Y. Br. 31; Rust Br. 37-38. They rely on this Court's decisions in *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568 (1988), and *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), which hold that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." 440 U.S. at 500. But as we have shown, Title X, as the Secretary has interpreted and applied it, does not give rise to "serious constitutional questions." *Id.* at 501. Contrary to petitioners' suggestion (Rust Br. 38 n.69), the mere fact that several lower courts have held a regulation unconstitutional does not mean that this Court must invalidate it on *Catholic Bishop* grounds. See also *United States* v. *Locke*, 471 U.S. 84, 96 (1985) ("[w]e cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question" (quoting *Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 379 (1933) (Cardozo, J.)); *Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979) (court should not adopt construction of statute necessary to avoid constitutional question unless construction is "fairly possible"). See generally *Board of Education* v. *Mergens*, 110 S. Ct. 2356 (1990) (adopting broad construction of Equal Access Act even though broad construction raised Establishment Clause questions).

[36] As we have explained (note 8, *supra*), the First Circuit invalidated the regulations as unconstitutional; however, it held that Title X authorizes the Secretary to promulgate Section 59.8 (prohibiting abortion counseling) and

first, the regulations' limitations on abortion counseling, referral, and advocacy (42 C.F.R. 59.8, 59.10), and second, the program integrity requirements (42 C.F.R. 59.9).

1. It is well established that when a court reviews an agency's construction of a statute that the agency administers, the court must first inquire "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If the statute "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. In this case, Section 1008—read in light of Title X's structure, purpose and history—answers the precise question at issue: Title X projects may not engage in abortion counseling, referral or advocacy. But even if the Court determines that Section 1008 does not address that precise question, the agency's answer is plainly based on a permissible construction of the statute.

a. The starting point for determining Congress's intent is, of course, the language of the statute. *E.g.*, *Community for Creative Non-Violence* v. *Reid*, 109 S. Ct. 2166, 2172 (1989). Section 1008 states:

> None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.

42 U.S.C. 300a-6. Petitioners concede that this language forbids Title X family planning projects from performing abortions. See Rust Br. 41; N.Y. Br. 12. They contend, however, that this is all that the section prohibits. In their view, a Title X project may encourage or promote abortions through counseling, referral, and advocacy. Rust Br. 41-44; N.Y. Br. 11-13.[37]

Section 59.10 (prohibiting abortion advocacy). *Massachusetts*, 899 F.2d at 64. Thus, the courts of appeal are in disagreement only with respect to Section 59.9, which deals with program integrity.

[37] Petitioners' position champions what amounts to an extreme departure from past, as well as present, HHS policy. HHS has consistently rejected the assertion that Title X projects are prohibited only from actually performing

As the court of appeals aptly stated, "[t]his is a highly strained construction of Section 1008." Pet App. 47a. Congress enacted Title X, among other purposes, to "make readily available information (including educational materials) on family planning and population growth to all persons desiring such information." Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, § 2(5), 84 Stat. 1504. A principal function of a Title X project is to provide clients with "information or 'counseling' as to a range of methods of family planning." Pet. App. 47a. If the Title X project provides information or counseling that characterizes abortion as a family planning option, then it has become a "program[ ] where abortion is a method of family planning." 42 U.S.C. 300a-6.[38]

As the court of appeals explained, it would make little sense to say that a program that counseled clients about the use of contraceptives or referred clients to other entities whose principal business is the provision of contraceptives is not a program where contraception is a method of family planning. See Pet. App. 47a. Similarly, "it would be wholly anomalous to read

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abortions. Since 1972, HHS has "interpreted section 1008 not only as prohibiting the provision of abortion but also as prohibiting Title X projects from in any way promoting or encouraging abortion as a method of family planning." 53 Fed. Reg. 2923 (1988). See Memorandum from Carol Conrad, *supra*, note 3. See discussion, pp. 41-42, *infra*. Thus, it is petitioners, not HHS, that seek "a dramatic reversal of agency policy." N.Y. Br. 8.

[38] Petitioners attempt to escape that conclusion by arguing that Title X subsidizes "family planning *methods and services.*" N.Y. Br. 11 (quoting, with emphasis added by petitioners, 42 U.S.C. 300(a)). They contend that while abortion is a family planning method, abortion counseling is a service and is therefore immune from Section 1008. See Rust Br. 41-42; N.Y. Br. 12-13. This argument is unavailing. Even if the Title X project is providing abortion counseling as a "service," that service treats abortion as a "method of family planning." The Title X project thus becomes a "program[ ] where abortion is a method of family planning." 42 U.S.C. 300a-6. Petitioners also contend that abortion, as they describe it, is not a " 'family planning' option equivalent to diaphragms, IUDs, oral contraceptives, and other pregnancy prevention options"; instead it is "a backup to contraceptive or human failure." Rust Br. 41 n.74. The fact remains that the use of abortion to terminate an unwanted pregnancy is the use of abortion as a method of family planning, "backup" or otherwise.

Section 1008 to mean that a program that merely counsels but does not perform abortions does not include abortion as a method of family planning." *Ibid.*

Title X's legislative history confirms that interpretation. The Conference Report, which petitioners acknowledge is "a legislative source entitled to great weight" (N.Y. Br. 14-15), explains:

> It is, and has been, the intent of both Houses that the funds authorized under this legislation be used *only* to support *preventive* family planning services, population research, infertility services, and other related medical, informational, and educational activities.

H.R. Conf. Rep. No. 1667, *supra*, at 8-9 (emphasis added). Thus, the Conference Report confirms that services directed to the termination rather than prevention of pregnancy—such as abortion counseling, referral, and advocacy—are not within the scope of the "preventive family planning services" Congress designed Title X to subsidize.[19]

Petitioners do not question the significance of this statement, but they interpret it differently. They argue that the quoted statement implicitly authorizes abortion counseling, referral, and advocacy as "other related medical, informational, and educational activities." Rust Br. 45; N.Y. Br. 14-15. The context makes clear, however, that the mission of Title X projects is to provide "*preventive* family planning services, population research, [and] infertility services" (H.R. Conf. Rep. No. 1667, *supra*, at 8 (emphasis added)) and that the "other related" activities must be in support of *those* objectives. If a woman seeks information on non-preventive birth control measures she must go elsewhere. Similarly, if a client is diagnosed as pregnant,

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[19] The passage quoted in the text appears in the "Statement of the Managers on the Part of the House." This Court observed in *National Ass'n of Greeting Card Publishers* v. *USPS*, 462 U.S. 810 (1983), that a Manager's Statement involved there, "while certainly significant," did not have the same status as the Conference Report itself because the Statement was not available to both Houses. *Id.* at 832 n.28. Here, the Manager's Statement was appended to the Conference Report and was submitted to both Houses prior to their passage of the final bill. See 116 Cong. Rec. 39,871, 40,884 (1970).

the Title X project's preventive family planning function is at an end, and the project must refer the client to an organization that provides post-pregnancy services.[40]

Petitioners rely on several "highly generalized statements about the expansive scope of the family planning services intended to be provided by Title X grantees." Pet. App. 48a. See Rust Br. 45; N.Y. Br. 14. As the court of appeals observed, not one of those statements indicates that Title X services include abortion-related activities. Pet. App. 49a. By contrast, the more specific legislative statements indicate that Title X services do not include abortion-related activities. For example, Congressman Dingell, a principal proponent of Section 1008, advised his colleagues that "[w]ith the 'prohibition of abortion' amendment —title X, section 1008—the committee members clearly intend that abortion is not to be encouraged or promoted in any way through this legislation." 116 Cong. Rec. 37,375 (1970). The clear implication is that Title X funds should not be applied toward abortion or toward activities that "encourage or promote" abortion. Thus, the generalized statements petitioners cite have little value in light of Section 1008's more specific language and legislative history. See *Chevron U.S.A. Inc.*, 467 U.S. at 862; *Jewell Ridge Coal Corp.* v. *Local No. 6167, United Mine Workers*, 325 U.S. 161, 168-169 (1945) (general remarks not probative of Congress's intent on narrow issue).[41]

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[40] If Section 1008 specifically *required* funding of abortion, it would be quite reasonable to view "other related" activities to include abortion counseling, referral, and advocacy. But here, where Congress has "prohibit[ed] the use of such funds for abortion" (H.R. Conf. Rep. No. 1667, *supra*, at 8), it would be incongruous to conclude that such activities are permissible. Indeed, if a Title X project's function to provide preventive family planning services and "other" related activities includes abortion counseling, other parties could insist that Title X projects provide the full gamut of post-pregnancy services ranging from pregnancy counseling to prenatal and obstetric care. That plainly was not Congress's intent.

[41] This Court has explained that "statements by individual legislators should not be given controlling effect, but when they are consistent with the statutory language and other legislative history, they provide evidence of Congress's intent." *Brock* v. *Pierce County*, 476 U.S. 253, 263 (1986). Other members ex-

Petitioners rely most heavily on Title X's "subsequent" legislative history. See Rust Br. 46-48; N.Y. Br. 16-19. Post-enactment legislative history, however, provides a "hazardous basis" for determining the enacting Congress's intent. *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980). It is particularly suspect here. Congress has not reenacted Title X, nor has it ever amended Section 1008; Congress has simply reauthorized appropriations for the Title X program. See Pet. App. 49a & n.2. Congressional committees and individual members have offered opinions in the course of reauthorizing appropriations, but these statements cannot somehow change, *nunc pro tunc*, the meaning of the underlying statute. See *TVA* v. *Hill*, 437 U.S. 153, 190-193 (1978) ("[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress").

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pressed a similar intent that Title X should not encourage abortion. See 116 Cong. Rec. 37,371 (1970) (statement of Rep. Pickle) ("I strongly support • • • the provision in the House version of this legislation that prevents this bill from being construed as support for abortion."). See also *id.* at 37,368 (statement of Rep. Carter); *id.* at 37,370 (statement of Rep. Bush); *id.* at 37,374 (statement of Rep. Broyhill); *id.* at 37,379 (statement of Rep. Dingell); *id.* at 37,382 (statement of Rep. Rogers).

Petitioners correctly observe (N.Y. Br. 15-16 n.12) that Rep. Dingell subsequently criticized the Secretary for relying on the statements the congressman made in 1970. See Letter from John D. Dingell, Chairman, Committee on Energy and Commerce of the U.S. House of Representatives to Otis R. Bowen, Secretary of HHS (Oct. 14, 1987) (J.A. 137-139). Rep. Dingell principally asserted that the Secretary should interpret Title X in light of its post-enactment legislative history. See J.A. 138. Significantly, Rep. Dingell did not take issue with the Secretary's understanding of Title X as enacted in 1970, or with the precise content of his statement. See *ibid.* ("My statement was made in opposition to the use of Federal funds to support or encourage abortion as a form of birth control."). Instead, he took issue with the inferences that should be drawn from his statement. See *ibid.* The relevant matter, however, is the Congress's collective understanding, and whatever interpretive inferences one might draw from a floor debate, it is clear that a congressman's post hoc clarification or revision of his statements—or perhaps even change of mind—has no probative weight in determining the collective body's intent at the time of passage. See *Bread Political Action Comm.* v. *FEC*, 455 U.S. 577, 582 n.3 (1982). See also, *e.g.*, *International Union of Electrical Workers* v. *Westinghouse Electric Corp.*, 631 F.2d 1094, 1104 (3d Cir. 1980).

Moreover, as the court of appeals explained, the statements petitioners cite are "unenlightening." Pet. App. 49a-50a. Indeed, the committee reports that address the issue of abortion counseling with any degree of specificity are the least likely to reflect collective congressional intent.[42]

Petitioners go so far as to rely not only on post-enactment history but post-enactment *inaction* as well. See Rust Br. 46 n.83; N.Y. Br. 17-18. Congress's rejection of various amendments prohibiting abortion counseling does not establish that Congress approved of that practice. See Pet. App. 48a.[43] More-

[42] For example, petitioners rely heavily (N.Y. Br. 18-19) on a passage from a 1985 committee report. See H.R. Rep. No. 403, 99th Cong., 1st Sess. 6 (1985). That 13-page report prepared by the Committee on Appropriations deals with 18 appropriations matters ranging from "Outrage Over 'Achille Lauro' Events" (*id.* at 5) to "Downtown Component of the Metrorail Dade County Florida" (*id.* at 7), and the entire discussion of pregnancy counseling is contained in the one brief paragraph quoted in petitioners' brief. Here, as in *TVA*, the congressional committees that have jurisdiction over family planning matters "would be somewhat surprised to learn that their careful work on the substantive legislation had been undone by the simple—and brief—insertion of some inconsistent language in Appropriations Committees' Reports." 437 U.S. at 191.

Indeed, when a 1987 report of the Committee on Labor and Human Resources suggested that Title X clients are entitled to "non-directive counseling" (S. Rep. No. 286, 100th Cong., 2d Sess. [*sic*] 14 (1987), it precipitated strong dissenting opinions. See *id.* at 23-24 (statement of Sen. Humphrey) ("Section 1008 was intended to establish a wall of separation between pregnancy prevention and pregnancy termination services. * * * Despite the statutory restriction * * *, Title X guidelines actually require abortion referral and 'non-directive' abortion counseling as part of 'options counseling'. This requirement contrasts sharply with the statute."); see also *id.* at 22 (statement of Sen. Hatch).

[43] Petitioners' amici discuss at great length the House of Representatives' 1978 rejection of amendments that would have expressly prohibited Title X projects from providing abortion-related counseling. Rep. Patricia Schroeder, *et al.* Amici Br. 19-21. As the court of appeals explained, Congress's rejection of those amendments certainly does not prove that Congress thought Title X allowed such counseling. Pet. App. 50a. Indeed, the legislative history shows that Congress did not have a clear understanding of the then-existing policy and practice concerning abortion counseling. The House rejected the amendment only after Rep. Rogers (the floor manager for Title X reauthorization) stated that Title X already prohibited abortion-related counseling and that,

over, as we explain (pp. 40-42, *infra*), even if Congress's rejection of those amendments indicated that Congress approved of a past administrative policy of allowing non-directive counseling (see p. 3, *supra*), it would not mean that the Secretary has no discretion to change that policy.[44]

b. We believe that Section 1008 prohibits Title X projects from engaging in abortion counseling and advocacy. But even if Section 1008 does not address that precise question, the agency's answer is certainly based on a permissible construction of the statute. See *Massachusetts* v. *Secretary of HHS*, 899 F.2d 53, 64 (1st Cir. 1990) (en banc).

This Court emphasized in *Chevron* that "when an agency is charged with administering a statute part of the authority it receives is the power to give reasonable content to the statute's textual ambiguities." *Department of the Treasury* v. *FLRA*, 110 S. Ct. 1623 (1990). "That is a task infused with judgment and discretion, requiring the ' "accommodation of conflicting policies that were committed to the agency's care." ' " *Ibid.* (citations omitted). The Secretary properly exercised that judgment and discretion here.

As we have already shown—and two courts of appeals have held—the Secretary's interpretation is consistent with the statute. Title X does not define the term "family planning services," nor does it enumerate precisely what types of medical

even if it did not, an amendment was unnecessary because Title X programs were not engaging in that practice. See 124 Cong. Rec. 37,046 (1978) (Rep. Rogers). See also 121 Cong. Rec. 17,219 (1975) (Rep. Rogers); 120 Cong. Rec. 21,687 (1974) (Rep. Roncallo). We discuss the defeated legislative initiatives in greater detail in our court of appeals brief. See Gov't C.A. Br. 37-44.

[44] As the First Circuit explained in rejecting an identical challenge to the Title X regulations, "such ratification would merely reflect acquiescence to a prior policy—it would not indicate that the Secretary's new policy exceeds his statutory authority." *Massachusetts* v. *Secretary of HHS*, 899 F.2d at 61. See also *Motor Vehicle Mfrs. Ass'n.* v. *State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 45 (1983) ("even an unequivocal ratification—short of statutory incorporation—of [a regulation] would not connote approval or disapproval of an agency's later decision to rescind the regulation").

and counseling services are entitled to Title X funding and what services are not. Section 1008 does, however, specifically prohibit funding of "programs where abortion is a method of family planning" (42 U.S.C. 300a-6), the Conference Report indicates that Title X is intended to support "preventive family planning services" (H.R. Conf. Rep. No. 1667, *supra*, at 8), and a principal sponsor indicated that "abortion is not to be encouraged or promoted in any way" (116 Cong. Rec. 37,375 (1970)).[45] Thus, since 1972, the Secretary's policy has been to prohibit Title X projects from performing abortions or engaging in activities "promoting or encouraging abortion as a method of family planning." 53 Fed. Reg. 2923 (1988). See pp. 3-4, *supra*. This policy reflects a proper exercise of the Secretary's responsibility to administer a statutory program while observing the conditions that Congress has imposed on the use of public funds. Cf. *OPM* v. *Richmond*, 110 S. Ct. 2465, 2471-2473 (1990); *Heckler* v. *Community Health Services*, 467 U.S. 51, 63 (1984). The 1988 regulations implement that policy.

Petitioners argue that the Secretary's 1988 regulations are entitled to "little deference" and are "arbitrary and capricious" because they depart from previous HHS guidelines and internal memoranda. N.Y. Br. 19-26. Petitioners vastly overstate those departures. But, in any event, an agency is entitled to change its policies. As this Court has stated:

> An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.

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[45] There is room to argue that the meaning of Section 1008 is less than completely clear. Indeed, Section 1008's language is not as clear as provisions of various appropriations acts that prohibit the use of federal funds "to perform abortions" (*e.g.*, District of Columbia Appropriation Act, 1988, Pub. L. No. 100-202, § 117, 101 Stat. 1329-99), or the Adolescent Family Life Act, which prohibits the funding of programs "which provide abortions or abortion counseling or referral" (42 U.S.C. 300z-10). There is no room to argue, however, that Section 1008 unambiguously states what petitioners contend: that Section 1008 prohibits the performance of abortions but nothing else.

Chevron, 467 U.S. at 863-864. Accord *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990); *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *American Trucking Ass'n* v. *Atchison, T. & S.F. R.R.*, 387 U.S. 397, 416 (1967). The relevant question is whether an agency's revision of an existing policy is "rational, based on consideration of the relevant factors, and within the scope of authority delegated to the agency by the statute." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. The Secretary's new regulations clearly meet that test.

As we have explained (pp. 3-4, *supra*), HHS has consistently followed the policy of forbidding Title X projects from activities that "encourage or promote" abortion; the question that continually arose from 1971 through 1981 was whether specific practices were consistent with that "non-encouragement" policy. 53 Fed. Reg. 2923 (1988).[46] In 1981, the Secretary issued guidelines that required Title X projects to offer "non directive" counseling and referral for abortion based on the premise that those activities "did not have the effect of promoting or encouraging abortion." *Ibid.* Shortly thereafter, however, the GAO and OIG issued their reports, finding that Title X projects were engaging in questionable practices and recommending that the Secretary "give more specific, formalized direction to pro-

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[46] See Memorandum from Joel M. Mangel, Deputy Ass't General Counsel, to Louis M. Hellman, M.D., Deputy Ass't Secretary for Population Affairs (Apr. 20, 1971) (J.A. 35-40) (describing HHS's "non-encouragement policy"); Memorandum from Joel M. Mangel, Deputy Ass't General Counsel, to Louis M. Hellman, M.D., Deputy Ass't Secretary for Population Affairs (Jan. 18, 1973) (J.A. 43-48) (same); Memorandum from Louis M. Hellman, M.D., Deputy Ass't Secretary for Population Affairs, to Hilary H. Connor, M.D., Regional Health Administrator (Nov. 19, 1976) (C.A. App. 134A-135) ("if you are funded under Title X, you cannot promote or encourage abortion"); Memorandum from Carol Conrad (Apr. 14, 1978), note 3, *supra* ("This office has traditionally taken the view that § 1008 not only prohibits the provision by Title X grantees of abortion as a method of family planning as part of the Title X-supported program, but also prohibits activities which promote or encourage the use of abortion as a method of family planning by the Title X-supported program."). J.A. 56. Petitioners' contrary characterizations are based on incomplete renditions of the relevant memoranda. See Rust Br. 43-44; N.Y. Br. 21 n.20.

grams about the extent of prohibition on abortion as a method of family planning." *Id.* at 2923-2924. See J.A. 82. The Secretary took that advice and in the process of conducting "informed rulemaking" duly reconsidered "the wisdom of its policy" (*Chevron,* 467 U.S. at 863-864). The Secretary determined, for the reasons we have explained, that abortion counseling, referral, and advocacy are inconsistent with Section 1008 and "promote or encourage" abortion. See 53 Fed. Reg. 2923-2924 (1988). The Secretary also determined, based on the GAO and OIG findings, that the guidelines set forth in the regulations were necessary to implement properly the statute and to prevent program abuses. *Ibid.* He therefore promulgated the regulations at issue here, responding in detail to public comment, including the complaints voiced by petitioners in this case. See *id.* at 2924-2943.

In short, the Secretary examined the relevant data, including the GAO and OIG reports and public comments, and articulated "a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43. He did not reach the conclusion that petitioners would prefer, but that is not the issue. His decision "was based on a consideration of the relevant factors" and does not reflect any "clear error in judgment." *Ibid.* See *Robertson* v. *Methow Valley Citizens Council,* 109 S. Ct. 1835, 1848-1849 (1989). Thus, as both the First Circuit and the Second Circuit concluded, the abortion counseling, referral, and advocacy regulations are entitled to deference and must be upheld. See Pet. App. 51a-52a; *Massachusetts,* 899 F.2d at 62-64.[47]

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[47] Petitioners make a number of exaggerated claims about the application of the regulations, suggesting, for example, that Title X project counselors cannot even say "the word 'abortion' to their patients" (N.Y. Br. 5) and that the telephone yellow pages "must be purged from the waiting rooms" of Title X facilities. Rust Br. 26. That hyperbole is not accurate. See 42 C.F.R. 59.8(a)(4), 59.8(b)(5); 53 Fed. Reg. 2941. See also Pet. App. 45a n.1. In any event, a court should not sustain a facial challenge to a regulation based on suggested fanciful applications, particularly those that the agency itself has rejected. See *Bowen* v. *Yuckert,* 482 U.S. 137, 154 n.12 (1987).

2. Petitioners' challenge to the Secretary's new "program integrity" regulations (42 C.F.R. 59.9) is likewise flawed. Petitioners contend that Congress did not authorize the Secretary's requirement that a Title X project "must be organized so that it is physically and financially separate" from activities that are prohibited by Section 1008 (42 C.F.R. 59.9) and, furthermore, that the requirement is unreasonable. N.Y. Br. 26, 30; see Rust Br. 48-50. Both contentions are incorrect.

Title X empowers the Secretary to promulgate regulations for administration of Title X grants and contracts. See § 1006(a), 42 U.S.C. 300a-4(a). This power includes the authority to promulgate regulations that are "reasonably related to the purposes of the enabling legislation." *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973). The Secretary's program integrity regulations are designed to assure that Title X grantees apply federal funds only to federally authorized purposes and that the grantees avoid creating the appearance that the government is supporting unauthorized activities.[48] This obviously is a permissible regulatory objective.

Furthermore, the specific requirements that the regulation imposes are in no sense arbitrary. In fact, HHS has consistently taken the position that Section 1008 requires some degree of

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[48] There is a manifest need for effective separation between a Title X project and prohibited activities; without it, an abortion clinic could be fully integrated into a Title X program, distinguished only by the bookkeeper's imagination in "allocating" the costs of abortions to non-Title X funds. That integration would result in a Title X project subsidizing or promoting abortion services. 53 Fed. Reg. 2940-2941 (1988); 52 Fed. Reg. 33,212-33,213 (1987). The Secretary noted that the program integrity regulations were "independently justified by the need to prevent existing or potential clients of Title X projects – as well as the general public – from concluding that the government endorses abortion." *Id.* at 33,212. The government has a legitimate interest in preventing such misapprehensions. See note 24, *supra*. Cf. McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. Rev. 405, 457 ("[o]nly a physical separation can prevent aid to the non-advocacy aspects of an organization's activities from accuring to the benefit of its advocacy by defraying a portion of the joint or common costs, and only a physical separation can preclude the intertwining of the government-funded activity and the organization's political or religious advocacy").

physical and financial separation between Title X projects and abortion-related activities.[49] However, based on experience, the Secretary concluded in the course of preparing the 1988 regulations that the informal guidance that HHS had previously given had failed to assure adequate separation. The GAO and OIG reports and testimony from private individuals revealed that grant recipients frequently failed to keep their Title X preventive family planning and infertility services separate from their abortion-related activities; consequently, there was a real likelihood that federal funds were being used for prohibited purposes. See 53 Fed. Reg. 2924 (1988); 52 Fed. Reg. 33,212 (1987). The Secretary's regulations responded directly to those findings. See *United States* v. *Kokinda,* 110 S. Ct. 3115, 3124 (1990) (plurality opinion) (change in Postal Service regulation governing solicitation based on "real-world experience").

The Secretary's new regulations require HHS to apply four specific non-exclusive criteria "to make case-by-case determinations as to whether a given Title X project is physically and financially separate from prohibited activities." 53 Fed. Reg. at 2940. These four requirements are not "arbitrary and capricious"; they are all rationally related to the objective of assuring that federal funds are not used to "promote or en-

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[49] For example, the Office of General Counsel issued an opinion in 1973 that concludes, in pertinent part:

> [A] mere technical allocation of funds, attributing Federal dollars to non-abortion activities and other dollars to abortion activities, in what is otherwise a discrete project for providing abortion services, would not, in our opinion, be a legally supportable avoidance of the section 1008 prohibition.
>
> In our opinion, the activities (abortion and non-abortion) must be so separated as to constitute separate programs (projects). As we have already indicated, our conclusion does not require separate grantees or even a separate health facility. However, neither do we think that separate booking entries alone will satisfy the spirit of the law.

Memorandum from Joel Mangel, Deputy Ass't General Counsel, to Albert B. Lauderbaugh, Chief, Office of Field Operations, National Center for Family Planning Services (Apr. 10, 1973). See also Memorandum from Carol Conrad (Apr. 14, 1978) (J.A. 59) note 3, *supra*.

courage" abortion. Indeed, petitioners do not suggest otherwise.[50]

Petitioners' complaint, at bottom, is that the program integrity regulation is arbitrary because it will cost grantees money in the form of "duplicating facilities and personnel" (N.Y. Br. 30) and because it will be applied in an arbitrary manner (*id.* at 30-31). Petitioners' first argument, however, is just another way of saying that Title X projects should subsidize other programs, including abortion-related services. As we have shown, that is what Section 1008 is designed to prevent. Petitioners' second argument goes beyond the bounds of their ostensibly facial challenge to the regulation.[51] Moreover, a grantee can "expect no less than to be held to the most demanding standards in its quest for public funds." *Community Health Services,* 467 U.S. at 63. This is particularly so when "real-world experience" has given the Secretary ample reason to believe that some of those who have sought program funds in the past have failed to "act with scrupulous regard for the requirements of law." *Ibid.*

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[50] Section 59.9 states that the Secretary "will determine whether such objective integrity and independence exist based on a review of facts and circumstances. Factors relevant to this determination shall include (but are not limited to): (a) the existence of separate accounting records; (b) the degree of separation from facilities (*e.g.*, treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities; (c) the existence of separate personnel; and (d) the extent to which signs and other forms of identification of the Title X project are present and signs and material promoting abortion are absent." 42 C.F.R. 59.9.

[51] That argument is both inappropriate in a facial challenge and not borne out by experience. The regulations have been enjoined in most areas of the Nation pending the outcome of the various legal challenges. However, they have been implemented in portions of five States (Kentucky, Iowa, Texas, Nevada, and South Dakota) and all of the territories. To date, no issues of compliance with 42 C.F.R. 59.9 have been raised. Clearly, petitioners have no basis whatsoever for contending that the Secretary will apply the criteria of that section in an arbitrary manner.

CONCLUSION

The judgment of the court of appeals should be affirmed.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
LOWELL V. STURGILL, JR.
Attorneys

MICHAEL J. ASTRUE
General Counsel

JOEL MANGEL
Deputy Chief Counsel

CAROL C. CONRAD
Attorney
Department of Health and Human Services

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DR. IRVING RUST, on behalf of himself, his patients, and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

RACHAEL N. PINE
(*Counsel of Record*)
JANET BENSHOOF
LYNN PALTROW
KATHRYN KOLBERT
STEVEN R. SHAPIRO
LOUISE MELLING
JULIE MERTUS
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800 ext. 520

LAURENCE H. TRIBE
KATHLEEN M. SULLIVAN
PETER J. RUBIN
1525 Massachusetts Avenue
Cambridge, MA 02138

(*Counsel Continued On Inside Front Cover*)

PETITION FOR CERTIORARI FILED MARCH 1, 1990
CERTIORARI GRANTED MAY 29, 1990

NORMAN SIEGEL
ARTHUR EISENBERG
CATHERINE WEISS
New York Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 382-0557

Of Counsel:

ROGER K. EVANS
Planned Parenthood Action
Fund, Inc.
810 Seventh Avenue
New York, New York 10019
(212) 541-7800

LAURIE R. ROCKETT
Hollyer, Jones, Brady, Smith,
Troxell, Barrett & Chira
342 Madison Avenue
New York, New York 10173
(212) 818-1110

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ARGUMENT

Petitioners do not complain that the government has failed to subsidize speech about abortion. *Contra* R.B. 11.[1] Rather, petitioners argue that the challenged regulations unconstitutionally condition Title X grants upon the surrender of First and Fifth Amendment rights.[2]

I. THE REGULATIONS VIOLATE THE FIRST AMENDMENT.

While there can be no doubt about the vitality of the unconstitutional conditions doctrine, *see, e.g.*, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987); *FCC v. League of Women Voters*, 468 U.S. 364 (1984), the Secretary attempts to evade its strictures. He argues that Title X grants impose no restrictions on the speech of grant "recipients" but simply *define* as eligible for grants only those "projects" in which a designated "service"—here, counseling about abortion—is not provided. R.B. 21-22. Because, in the Secretary's view, the "grantee" that *runs* the "project" remains free to speak as it wishes, R.B. 12, 21-22, the regulations "do[ ] not infringe any constitutional right." R.B. 20.

But "[r]ewriting the argument to eliminate the play on words makes clear that there is nothing to it." *Nollan*, 483 U.S. at 838. The Secretary's proposed technique of redefining every conditioned grant or dispensation as a "specific subsidized service" free of constitutional constraint, R.B. 21, would enable virtually *any* condition on a subsidy to escape

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1 Petitioners herein refer to the Brief for the Respondent in Nos. 89-1391 and 89-1392 as "R.B. _____" and to the Brief for Petitioners in No. 89-1391 as "P.B. _____." *See generally* P.B. 1 n.1 (regarding citation form).

2 Since petitioners filed their initial brief with this Court, the Tenth Circuit Court of Appeals has joined the First Circuit Court of Appeals in holding the regulations unconstitutional. *Planned Parenthood Fed'n of Am. v. Sullivan*, No. 88-2251 (10th Cir. Sept. 6, 1990) (reprinted in Exh. A herein) ("*PPFA* at A-_____"); *Massachusetts v. Secretary of Health & Human Servs.*, 899 F.2d 53 (1st Cir.) (*en banc*), *petition for cert. filed*, 58 U.S.L.W. 3824 (U.S. June 26, 1990) (No. 89-1929).

the scrutiny of this Court.[3] Indeed, governmental subsidies and waivers—including regulatory exemptions, permits, entitlements like Medicare, and grants for health, research, and education—could all be made the instruments of censorship in a marketplace dominated by government largesse.

The constitutional infirmity of the regulatory conditions the Secretary seeks to impose on Title X grantees cannot be obscured by such definitional legerdemain. His regulations must, therefore, be measured by traditional First Amendment standards.

A. Government May Not "Speak" by Distorting the Medical Information Provided by Health Professionals to Their Patients.

1. Distortion of the medical treatment dialogue cannot be defended by analogizing medical treatment to a TV documentary.

The Secretary's central refrain is that "the government is entitled to participate in public discourse," R.B. 22, by subsidizing specialized "projects" that espouse a particular "viewpoint." R.B. 23 n.21. In short, he argues that because the government may "act[ ] as a 'participant in the marketplace

3 In *FCC v. League of Women Voters*, for example, this Court forbade the government to condition its provision of funds on noncommercial television stations' agreement not to editorialize. Surely that case would not have come out differently had the government there insisted that its intention was only to fund "projects" that it defined as "editorial-free television stations"– projects that left the "grantee" free to exercise its right to editorialize elsewhere. So, too, in *Ragland*, where every member of this Court found that some constitutional restraint applied to conditions imposed on government subsidies and dispensations, *see* 481 U.S. at 229-30 (content discrimination); *id.* at 237 (Scalia, J., dissenting) (viewpoint discrimination), the government could not have evaded the Constitution's reach by defining its sales tax exemption as applicable only to "projects" to publish certain magazines that do not contain articles of "general interest" while leaving the "grantee" free to publish another magazine containing such articles unaided by the tax exemption.

Likewise, in *Nollan*, the state's conditioning of its building permit on the ceding of a beachfront easement surely could not have been saved by redefining the building permit as available only for "projects" to renovate beachfront homes that had ceded lateral easements.

of ideas' " by commissioning the production of a "television . . . documentary" made to government specifications, it follows that the government may subsidize clinical medical programs subject to the condition that their health professionals speak to patients according to these same specifications. *See* R.B. 22-23. But Title X clinics provide no mere docudrama, and their doctors and patients are unlike actors and those who watch them perform. It is precisely this difference that makes the regulations "an unacceptable means of conveying a message that [may] otherwise [be] legitimate." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 715 (1977) (Stevens, J., concurring).[4]

Perhaps government can be said to have "spoken" by choosing to subsidize family planning information and services through Title X. But once it regulates the content of the speech it has funded, "complicated First Amendment issues are presented." *University of Pennsylvania v. EEOC*, 110 S. Ct. 577, 587 n.6 (1990). That complexity demands close scrutiny of the factual context in which the funded speech occurs.[5] Thus, the Secretary's claimed right to express his views by regulating a funded medical treatment dialogue must be assessed in light of such factors as the compatibility of

4 Indeed, all available means of enforcing these speech restrictions are themselves unacceptable. "[O]fficial scrutiny of the content of [speech] as the basis for [denial of a government subsidy] is entirely incompatible with the First Amendment[ ] . . . ." *Ragland*, 481 U.S. at 230. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 760 (1988) (bureaucratic review is constitutionally suspect); *New York Times v. United States*, 403 U.S. 713, 714 (1971) (First Amendment condemns prior restraints).

5 This Court has always evaluated First Amendment claims in light of the context of the speech. Thus, comparable if not identical words can compel disparate constitutional results in different contexts. *See Grayned v. City of Rockford*, 408 U.S. 104, 116-17 (1972); *cf. FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978) (emphasizing that "context is all-important"). For example, picketing focused on a particular residence may be prohibited even when more generally focused picketing cannot be, *Frisby v. Schultz*, 487 U.S. 474 (1988); in-person solicitation by an attorney may be prohibited whereas solicitation through an advertisement may not be, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); offensive programs may be prohibited on daytime radio, *Pacifica*, 438 U.S. at 748-50, but not on the telephone, *Sable Communications, Inc. v. FCC*, 109 S. Ct. 2829, 2839 (1989).

viewpoint bias with the history and function of the forum where the affected speech occurs;[6] the target audience's ability to "avert its eyes" or "turn the channel," R.B. 27;[7] and the harm to the target audience of viewpoint-based suppression of relevant information.[8] Such factors demonstrate that, whatever may be the government's power to control the speech it subsidizes, the First Amendment precludes viewpoint-based manipulation of the dialogue between funded health care professionals and their patients.

Title X, like Medicare, is an alternative source of funding for medical care. Unlike a government-commissioned television broadcast, the Title X program does not provide government speech at all. Rather, it provides government-supported medical services for low-income women who would not otherwise be able to obtain them. The provision of Title X family planning services is not "contract[ed] out," R.B. 22, to local public and not-for-profit health care agencies, 42 U.S.C § 300(a) at J.A. 3, so that they may perform a role in a government-scripted play. Instead, the employees of such agencies are expected to serve as "health care *professionals*," R.B. 25 (emphasis added), governed by existing ethical and legal norms. *See infra* nn.9 & 26. It is the function of these physicians and counselors, as of all health professionals, to give advice, information, and referrals to their patients

6 For example, in the context of government-subsidized education, this Court has considered the history of the "classroom [as] peculiarly the 'marketplace of ideas' " in assessing First Amendment claims. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

7 In assessing First Amendment claims, this Court has repeatedly considered whether a recipient of information "has [a] meaningful opportunity to avoid" the speaker's message. *Sable*, 109 S. Ct. at 2837. *See Pacifica*, 438 U.S. at 748-49; *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-03 (1974).

8 Regulation of even funded speech that has the intent or "effect" of suppressing information or ideas violates the First Amendment. *Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983) ("*TWR*"). Censorship is particularly abhorrent when the information that the government seeks to suppress is necessary to prevent harm to the would-be recipient. *See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-64 (1976).

according to their professional judgment and their patients' best interests.[9] No other manner of health care delivery is consistent with the fundamental premises of medical self-determination and patient choice.

In this context, the Secretary's effort to convert the Title X program into a vehicle for expressing the government's preference for childbirth over abortion is incompatible not only with the history and function of medical care, *see* ACOG *Amici* Brief at 4-6, 11; *see generally* P.B. 20-21, but also with the history and function of the First Amendment to assure the marketplace of information necessary for self-fulfillment and self-determination.[10] *See Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972); *see generally* T. Emerson, *The System of Free Expression* 6-7 (1970). Here, the Secretary seeks to "speak" by "contract[ing] the spectrum of available knowledge," *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965), and by "choos[ing] the appropriate subjects for . . . dis-

9 The professional standards of the American Medical Association thus require doctors to provide full and unbiased information about and referral for all medical options, J.A. 79-81; *see also* J.A. 76-78; *infra* Point II, including those they are themselves unwilling or unable to provide, *see* 84a; Br. of *Amici Curiae* American College of Obstetricians & Gynecologists, *et al.* in Support of Petitioners ("ACOG *Amici* Brief") at 4-6. These standards reflect the reality that a disparity in medical knowledge and pressing personal circumstances often leave people seeking health care ill-equipped to recognize distortions and omissions in their physicians' advice and unable simply to "switch the channel." Indeed, for low-income family planning patients few other "channels" even exist. As the Tenth Circuit noted, "[I]t seems clear that government funding . . . fuels virtually all 'birth control' clinics in the nation . . . ." *PPFA* at A-16. NOTE: Congress appropriates between one and two *hundred million* dollars annually to support Title X programs, not "one to two million dollars" as stated in a typographical error in petitioners' brief. *See* P.B. 2.

10 Imagine, by analogy, a public defenders' office where lawyers are told they must counsel defendants that they would be better off confessing than resisting the state and where lawyers are forbidden to inform their clients of the right to remain silent and are forbidden to refer their clients to lawyers free to do so. A publicly-funded version of "L.A. Law" could be slanted toward such a view, but surely *real* lawyers, even those in a publicly-funded program of legal aid, *cf. Polk County v. Dodson*, 454 U.S. 312, 325 (1981) (holding that public defenders when performing lawyers' traditional functions are not state actors), could not be required to conform their professional judgments to such a government-approved viewpoint.

course," *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 515 (1981). Although the Secretary may, perhaps, "speak" his views by such means as informational pamphlets to be distributed in the waiting rooms of funded clinics, he may not do so by means of viewpoint-based censorship of the medical treatment dialogue in a manner at odds with patient health.

2. Health-endangering distortion of the medical treatment dialogue cannot be negated by disclaimers.

The Secretary argues that the dangers to women's health that these regulations would otherwise cause[11] can be neutralized by having every physician voluntarily issue a warning that the Title X program "provides only pre-pregnancy services, and [that] clients should go elsewhere if they desire *either* abortion-related counseling and services *or* obstetric care in carrying the child to term." R.B. 15 (emphasis in original). But even with the Secretary's proposed voluntary disclaimer, the regulations lay a "trap for the . . . unwary." *See* 61a (Cardamone, J., concurring).

First, a disclaimer of limited services at the clinic door will not lead women to "go elsewhere." R.B. 15. Both new and long-term patients come to Title X clinics because they don't know they're pregnant, and they do not always know in advance whether abortion information or referral will turn out to be medically indicated and immediately needed. For this reason, many women will be unable to assess, before entering the clinic, the relevance of the censored information to their personal medical circumstances. Thus, even if a disclaimer is prominently posted, women will be drawn into the clinic by its offer of free pregnancy tests, family planning counseling, and referral for all medical needs except abortion.

11 The unrefuted record on summary judgment establishes that Title X patients diagnosed as pregnant will face real medical risks as a result of the misleading information compelled by the regulations. Women will mistakenly conclude from their doctor's advice that childbirth is their only option, J.A. 154, 284-85; those women erroneously led to believe that continued pregnancy will not jeopardize their health will not obtain timely medical care, *e.g.*, J.A. 254-55; and for others, the delay prompted by the nonresponsive referral list will increase the risk of medical complications and even death from delayed abortion, J.A. 227, 192-95.

tion. *PPFA* at A-16. Title X patients will not simply abandon long-term clinic relationships, and women needing or desiring abortion information will not just "go away." *See id.*[12]

Second, once a woman has entered the clinic, the proposed disclaimer will not protect her from the deceptive medical advice she will receive there. Physicians and counselors will be required to "mislead" in a most literal sense; in short, "to lead [patients] in a wrong direction or into a mistaken action or belief." *Webster's Third New International Dictionary* 1444 (1986). Women are led "in the wrong direction" because, even with a disclaimer, *see* R.B. 15, health professionals must steer their patients out the door with a map on which nearly all roads leading to safe and legal abortion have been erased, and on which any road not erased has been left unmarked. Whether or not a disclaimer is given, patients will have no way to discover which, if any, provider on the mandatory referral list, *see* § 59.8(a)(2), may give them the complete counseling or abortion services they seek, *see* § 59.8(a)(3), except through a series of hit-or-miss visits or phone calls. *See* J.A. 154-55, 285-86.

Further, the disclaimer will not prevent a woman from being led into a "mistaken . . . belief" that an abortion would be ill-advised. If a woman does not ask about abortion, the regulations guarantee she will not be told about it. If she does ask, the doctor can only state that "the project does not consider abortion an appropriate method of family planning." § 59.8(b)(5). The doctor cannot explain the medical safety of the procedure, its legal availability, or its pressing importance to the patient's health.[13] Although the

12 The Secretary's "assumption of risk" theory that women who enter a Title X clinic, properly labeled, will have "elect[ed] to participate," R.B. 17, in its limited services is thus a fallacy. From the perspective of a woman who suspects she may be pregnant, the only thing she "elects" is the free pregnancy test she is offered.

13 Though the resulting delay in obtaining critical care may greatly increase a woman's medical risks, the Secretary argues that the delay is "volitional," R.B. 17 (discussing Fifth Amendment), and justified by his interest in disassociating Title X programs and the federal government from abortion-related speech, R.B. 17-18 n.13 (same). But once a woman is in the care of a Title X physician who gives her a misleading referral and tells her

Secretary suggests that the pregnant woman can just "go elsewhere" or "turn the channel," *see* R.B. 16-17, more likely she will ask herself: "Why does my doctor think abortion is 'inappropriate'? Because it is dangerous? Because it is dangerous for me? Because it is now illegal?" Indeed, because an abortion referral cannot be given even when medically indicated,[14] when a physician gives a patient with cancer, for example, referrals only to a cancer specialist and a prenatal care provider, *see* §§ 59.5(b)(1), 59.8(a)(1), the patient receives the false impression that her pregnancy does not actually threaten her health.[15]

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that abortion is inappropriate, the misinformation she receives becomes, at the very least, a contributing cause of the consequences that ensue. *See generally* Exh. B herein; ACOG *Amici* Brief at 24-29. Nor can the Secretary justify increases in medical risk by a governmental interest in disassociation. *First*, it is doubtful that such an abstract governmental interest would be weighty enough to justify the imposition of physical harm. *Cf. Carey*, 431 U.S. at 715 (Stevens, J., concurring). *Second*, less restrictive means of furthering this interest are available. For example, the Secretary could require all abortion referrals to be accompanied by the statement: "You should not interpret this referral as an indication that the federal government, which funds this clinic, sanctions your choice to obtain an abortion." *Third*, this Court has repeatedly held that an interest in disassociation cannot justify viewpoint discrimination. *See Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 809-11 (1985); *Widmar v. Vincent*, 454 U.S. 263, 271 n.10 (1981) (creation of forum does not imply "endorse[ment] . . . of the particular ideas aired there").

14 No abortion counseling or referral is permitted even when the pregnancy may exacerbate an underlying medical condition such as diabetes, sickle-cell anemia, cancer, AIDS, multiple sclerosis, epilepsy, myasthenia gravis, and certain cardiovascular disorders. *See* J.A. 254-55; *see also* Br. of *Amici Curiae* The American Public Health Association, *et al.* in Support of Petitioners at 9-10, 15; ACOG *Amici* Brief at 7-8. Suppose, for example, a woman who is HIV positive or has a severe cardiac abnormality obtains a confirmation of pregnancy at a Title X clinic and asks her Title X-funded physician or counselor: "If I do not have an abortion, will continued pregnancy jeopardize my health? Can I get a Medicaid-funded abortion? Where?" The answers to these questions are matters of fact, not advocacy. But because a truthful answer even to such factual questions will "assist" a woman in obtaining an abortion, *see* § 59.10, and constitute "counseling concerning" and "referral for" abortion, § 59.8, it violates the regulations. *See* Preamble to Final Regulations, 53 Fed. Reg. 2922, 2937 (1988) ("Pr., __").

15 Pregnancy may mask the extent of a cancer and actually accelerate the spread of tumors. *See generally* Williams & Bitran, *Cancer & Pregnancy*,

We all depend on our doctors. A pregnant woman going to a Title X clinic is no different. She, too, will depend on what her doctor is saying ("abortion is not appropriate") and take her Title X doctor's half-truths as reliable medical advice. Yet, a Title X health professional, who looks like a doctor and talks like a doctor, will not be free to *act* like a doctor—because the Secretary's regulations forbid him from providing full and accurate information about all lawful medical alternatives. Even with a disclaimer, patients will be induced to rely on the aura of trustworthiness that the image of the doctor projects.

Thus, not even the most detailed warning on the Title X "package" can neutralize the deception the regulations compel.[16] Medical care is not a product, and patients are not consumers in a world of *caveat emptor*. Because the Secretary's regulations require physicians to deceive by omission, they "place[ ] obstacles in the path of . . . [the] freedom" to receive reliable medical information. *TWR*, 461 U.S. at 549 (quoting *Harris v. McRae*, 448 U.S. 297, 316 (1980)).

B. The Distortion of Medical Dialogue Mandated by the Regulations Cannot Be Disguised by Characterizing Them as Viewpoint Neutral.

Having at first conceded that his regulations "exhibit a bias in favor of childbirth and against abortion," Pr., 53

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12 Clin. Perinat. 609 (1985). *See also* ACOG *Amici* Brief at 7-8. A woman's health will be further threatened as any radiation treatment or chemotherapy, effective courses of treatment for cancer, may be circumscribed during pregnancy. *Id.* at 8.

16 Even to approximate full protection, the disclaimer would have to detail the full nature of the limitations. For example,

> I can tell you whether you are pregnant and I can tell you if you suffer from a serious medical condition, but unless the government considers your medical condition to be a life-threatening emergency, I cannot tell you whether or why you need to know about the effect of your medical condition on your pregnancy. Thus, I will not be able to give you any information about abortion, even if in my professional judgment your health will suffer. As a result, the information you will receive may not protect your health unless it is supplemented with information from other sources—sources that I am not free to name.

Fed. Reg. 2943, the Secretary now attempts to argue that the regulations need not be regarded as viewpoint discriminatory after all. In particular, he argues that, because Title X programs do not offer post-conception services, *e.g.*, R.B. 7, 35-36, the regulations "are content-based" in that they "prohibit all discussion of abortion 'pro or con.' " R.B. 23 n.21 (citing 59a). But the Secretary also concedes that whether his regulations are characterized as content or viewpoint based, "the [constitutional] analysis" in the instant case is "much the same." R.B. 23 n.21. Indeed it is.

When the government excises speech on a single, relevant topic from within a subject matter area it has decided to fund, its actions may be no less discriminatory than when it picks and chooses among opposing views.[17] It is the particular context in which the discrimination takes place that indicates whether, in that instance, it is invidiously viewpoint-based and thus antithetical to the First Amendment. While directing a clinic to confine its services to family planning and not to use Title X funds for a job counseling program, for example, would constitute a content-based implementation of an unproblematic notion of relevance—like telling a biology teacher to limit her class to the subject of biology—the Secretary's attempt to excise all nonpejorative information about abortion from the mandatory discussion of pregnancy and prenatal care *is* invidious viewpoint discrimination and *not* a relevance-based constraint of this nature.[18]

17 For example, when government funds a conference on energy policy but prohibits discussion of alternatives to nuclear power, or a conference on the political situation in the Middle East but bans discussion of Palestinian liberation, it tips the scales of free expression no less than if it prohibited only "anti-nuclear power" or "anti-Israel" speech. In such a context, censorship of a single topic of discussion may well constitute viewpoint discrimination.

18 Pregnancy and pregnancy options, such as abortion, are topics that are inextricably intertwined with the provision of comprehensive family planning services. P.B. 2-9. In this context, the Secretary cannot cite *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), for the proposition that his discriminatory excision of the topic of abortion is not

The Secretary says his regulations reflect a mere policy choice not to fund post-conception care or any speech about abortion, and not an invidious discrimination against any particular subject matter or view. R.B. 12, 23 n.21. But, in fact, the regulations do *not* require the Title X clinic simply to announce to every pregnant woman that she must leave because the clinic does not provide post-conception services. *See PPFA* at A-14. Rather, the regulations mandate that the Title X clinic provide *a certain kind* of information to the pregnant woman with regard to her pregnancy.

The regulations do *not* prohibit "all discussion of abortion." *Contra* R.B. 23 n.21. If a pregnant woman asks about abortion, she will be told that the clinic does not consider it an "appropriate method of family planning." § 59.8(b)(5). This *is* a "discussion of abortion," albeit conclusory and one-sided. At the same time, nothing in the regulations precludes speech *hostile* to abortion. *See*, *e.g.*, §§ 59.8, 59.10. Indeed, every example of prohibited speech in section 59.10(b) illustrates what the Secretary has condemned as abortion "advocacy." And, of course, the regulations specifically prohibit speech that "encourage[s], promote[s], or advocate[s] abortion." § 59.10(a).

Simultaneously, the clinic *must* provide the pregnant woman with a skewed "list of available providers that promote the welfare of mother and unborn child," § 59.8(a)(2), (a)(3), and with "information necessary to protect the health of mother and unborn child until such time as the referral appointment [for prenatal care] is kept." *Id.*[19] Indeed, the post-conception prenatal care information compelled by the

"invidious." Those decisions offer no support for a deceptive and discriminatory line between *information* about childbirth and *information* about abortion in government-subsidized medical counseling following a government-subsidized pregnancy test.

19 These and other post-conception services the Secretary continues to provide to pregnant women belie his assertion that pregnancy diagnosis ends the Title X project's role. R.B. 35-36. *See* Pr., 53 Fed. Reg. 2937 (prenatal care); Pr., 53 Fed. Reg. 2927 (social services); J.A. 75 (AIDS treatment referrals); Pr., 53 Fed. Reg. 2937 (other medical referrals).

regulations is itself not "neutral."[20] Most obviously, the repeated references to the welfare of the "mother"—a term defined to mean "a woman who has given birth," *Webster's Third New International Dictionary* 1474 (1986)—rather than the "woman," and to the "unborn child," rather than the "fetus," further highlight the viewpoint the regulations are intended to conceal.

A regulation is viewpoint neutral only when it " 'does not favor either side of a political controversy,' " *Boos v. Barry*, 485 U.S. 312, 319 (1988) (quoting *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980)), and does not "regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). In this case, the Secretary not only favors one side of a politically-charged medical choice between childbirth and pregnancy termination, but admits the bias that the Constitution condemns. Pr., 53 Fed. Reg. 2943, 2944. That he has not chosen the even more extreme course of compelling anti-abortion advocacy is immaterial.[21]

C. Nor Can the Secretary Impose Substantial Burdens on Speech Supported by Non-Title X Funds Simply Because Grantees Remain "Free" to Decline Title X Grants Altogether.

The Secretary does not deny that the challenged regulations will restrict speech supported by non-Title X monies.

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20 The regulations do not, for example, evenhandedly maintain the status quo for undecided women. *Contra* R.B. 16 n.11. "Interim" care and information relevant to *women's* health are provided only for women who intend to carry to term. The regulations do not permit the Title X provider to offer a woman "interim" abortion information or a referral when an abortion may be medically indicated, P.B. 8-9, 34—or when she is "decided," but in favor of pregnancy termination.

21 *See Massachusetts v. HHS*, 899 F.2d at 73 (the regulations "slant the content of the relevant counseling in an 'antiabortion' direction"); *PPFA* at A-15 (regulations " 'facially discriminate on the basis of viewpoint and control the content of the [Title X] grantee's permitted speech' " (quoting and relying upon *New York v. Sullivan*, 889 F.2d 401, 416 (2d Cir. 1989) (Kearse, J., dissenting), *cert. granted*, 110 S. Ct. 2559 (1990))).

R.B. 29-32. Instead, he argues that conditions on "specific, federally subsidized project[s]," R.B. 30, that severely burden substantial private resources are permissible so long as grantees who "object[ ] . . . can simply decline the subsidy." *Id.* Notwithstanding the plain holding of *FCC*, 468 U.S. 364, the Secretary asserts a "take it or leave it" approach in defending the scope of his grant-making authority to restrict even speech he doesn't subsidize.

This Court has repeatedly rejected the proposition that government grants may be conditioned on relinquishment of a constitutional right because an individual or organization can decline the subsidy. The plaintiffs in *Frazee v. Illinois Department of Employment Security*, 109 S. Ct. 1514, 1516-18 (1989), *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958), and *Rankin v. McPherson*, 483 U.S. 378, 390-92 (1987), no less than petitioners in this case, could have "declined" government benefits, but this Court held that they should not be "forced to choose" between the exercise of their First Amendment rights and the receipt of government funds. *Frazee*, 109 S. Ct. at 1516 (citation omitted); *see also Nollan*, 483 U.S. at 836-42. Likewise, it was no answer to stations seeking conditioned Public Broadcasting Corporation grants that, if they disliked the conditions, they could simply choose not to accept the grants. *See FCC*, 468 U.S. at 400.[22]

Thus, the Secretary's argument that the ability simply to decline the subsidy renders all conditions constitutional cannot be squared with this Court's precedents; so, too, his claim that petitioners herein remain "free" to speak about abortion even if they choose to accept the Title X grant cannot be squared with the sweep of the regulations. First, the

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22 *South Dakota v. Dole*, 483 U.S. 203 (1987), is not to the contrary. *Dole* did not, as the Secretary suggests, R.B. 30-31, sanction the conditioning of federal funds upon compliance with *any* directive, merely because the state could decline the funds. Rather, this Court in *Dole*, although finding the Twenty-First Amendment not to be a bar, emphasized that "other constitutional provisions may provide an independent bar to the conditional grant of federal funds." 483 U.S. at 208 (citations omitted); *see id.* at 210 (noting that "a grant of federal funds conditioned on invidiously discriminatory state action" would be impermissible because government may not pay one to violate the rights of another).

requirement that petitioners contribute matching funds, patient fees, and third-party payments to the "Title X project," § 59.2, does not, in fact, leave grantees "free," as the Secretary implies. Indeed, the Secretary concedes that his prohibitions cover a substantial portion of the grantees' "private" resources and that "[t]here is no clear differentiation" between these monies, which cannot be used to set up a separate facility under § 59.9, and the Title X grant for purposes of the challenged regulations. R.B. 29-30 n.29.[23]

Second, the Secretary wholly ignores the severe burden on non-Title X dollars imposed by the distinct requirement that speech about abortion continue only in a facility that is *physically* separate from the entire Title X program, § 59.9,[24] and by the limitations on communication between even such physically separate affiliates, § 59.8(a)(3). *See* P.B. 24-31. The challenged regulations thus go well beyond the option of financial and corporate segregation within an existing facility that this Court has suggested could save an otherwise unconstitutional burden on privately funded speech. *TWR*, 461 U.S. at 544 n.6; *FCC*, 468 U.S. at 400. These regulations, unlike those the Court hypothesized in *FCC*, do not even permit the grantee to set up a separately funded affiliate "us[ing]" its existing physical "facilities." *See FCC*, 468 U.S. at 400. The burdens imposed on grantees here are, thus,

23 What the government does not disclose, in an effort to make palatable its restrictions on non-Title X funds and to distinguish the facts of *FCC*, 468 U.S. 364, is the significant amount of money the regulations encumber. For example, non-Title X funds account for more than 40% of the revenues of the Title X program at Columbia Presbyterian Hospital and over 50% of the revenues of the Title X program of Planned Parenthood of New York City. FY 1989 Grant Thornton Audit Report Medical and Health Research Association of New York (submitted to HHS, Region II). *See also Massachusetts v. HHS*, 899 F.2d at 55-56.

24 Contrary to the government's suggestion, R.B. 24 n.23, a facial challenge to § 59.9 is appropriate. Although the regulation permits a review of "facts and circumstances," it provides that a project "*must* be organized so that it is physically and financially separate" and that the factors relevant to a consideration whether the project is sufficiently separate *shall* include the "degree of separation from facilities . . . in which prohibited activities occur" and the "existence of separate personnel." § 59.9 (emphasis added).

too severe, *see* P.B. 27-31; *see, e.g.*, J.A. 156, 165-67, 275, to be permissible. *Cf. FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986) (plurality opinion) (finding separation requirement to be unduly burdensome on speech rights).

II. INDEPENDENT OF *ROE*, THE REGULATIONS VIOLATE THE FIFTH AMENDMENT.

Petitioners contend that the challenged regulations violate the Fifth Amendment because women entering Title X clinics who desire or need abortions are harmed by the medical misinformation they receive.[25] The Secretary as much as concedes that women will be misled and misinformed. *See generally supra* Point IA(2). The argument that this mandatory medical misinformation violates the Fifth Amendment, *see* P.B. 31-36, does not depend on *Roe v. Wade*, 410 U.S. 113 (1973), and thus does not present the issue of its continued validity, an issue raised by the Secretary. R.B. 13.

While the interest in making informed and voluntary choices is central to reproductive freedom, *see, e.g., Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986), the liberty interests at issue in this case go well beyond the abortion choice. Title X patients, like other patients, have a liberty interest in being free from unwarranted governmental intrusion in the informed consent dialogue that is necessary to medical self-determination. *See*

25 Even the Secretary does not deny what every court to consider the regulations has found—namely, that the regulations "hamper or impede women in exercising their right of privacy in seeking abortions." *See* 55a; 61a (Cardamone, J., concurring). *See also Massachusetts v. HHS*, 899 F.2d at 69-70 (detailing obstacles to women's ability to choose an abortion created by the regulations); *PPFA* at A-12 to A-20 (same). Accordingly, even under this Court's decisions in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990), and *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990), the regulations unduly "encumber[ ] the woman's exercise of th[e] constitutionally protected right [whether or not to bear a child] by placing obstacles in the path of the doctor upon whom she [is] entitled to rely for advice in connection with her decision." *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977). *See* P.B. 31-36; *supra* Point IA(2).

Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841, 2851-52 (1990); *id.* at 2856 (O'Connor, J., concurring). Little is more "deeply rooted in this nation's history and tradition," *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (Powell, J., plurality opinion), than the right to free and open consultation between doctors and their patients on factual matters necessary to patient health. It does not seem too much to say that both the right of a patient to trust that her physician's advice is free of unwarranted governmental intrusion—and the right of a doctor not to be compelled to participate in "state-promulgated disinformation," *Thornburgh*, 476 U.S. at 800 (White, J., dissenting)—are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).[26]

These liberty interests have little or nothing to do with *Roe*; no member of this Court has suggested that, if *Roe* were overturned, states could not continue to permit abortion as an entirely lawful medical procedure. *Cf.*, *e.g.*, *Webster*, 109 S. Ct. at 3066 (Scalia, J., concurring). That doctors may not be paid by the government to suppress information concerning such a lawful medical option—and thereby to breach patient trust—is surely fundamental.[27]

III. THE SECRETARY HAS FAILED TO JUSTIFY READING TITLE X IN A MANNER THAT RAISES SERIOUS CONSTITUTIONAL CONCERNS.

The Secretary concedes that this Court should not uphold a construction of Title X that raises serious constitutional ques-

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26 Indeed, the common law duty to disclose material information in the context of a fiduciary relationship or "similar relation of trust and confidence," *Chiarella v. United States*, 445 U.S. 222, 228 (1980) (citing Restatement (Second) of Torts § 551(2)(a) (1976)), has been applied historically to the doctor-patient context, *see* P.B. 20-21, and adopted by nearly every state as a basis for civil liability. *See, e.g.*, Exh. B to P.B.; Exh. B herein; *see generally Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

27 Since the rights recognized in *Roe* would in no event be dispositive, this Court should decline to revisit the constitutional underpinnings of those rights here. *Webster*, 109 S. Ct. at 3060-61 (O'Connor, J., concurring).

tions so long as an alternative construction exists that is "fairly possible." R.B. 32 n.35 (citation omitted). *See generally* P.B. 37-39. He argues, however, that no serious constitutional issues are raised, R.B. 32 n.35, and in any event that his interpretation of Title X to forbid abortion counseling and referral is permissible, R.B. 33, 39-40. *See generally Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-45 (1984). In thus persisting in his reliance on *Chevron*, the Secretary misses the point.

> Even if [his] construction of the Act were thought to be a permissible one, [it is] quite [certain] that in light of the traditional rule followed in *Catholic Bishop*, [this Court] must independently inquire whether there is another interpretation, not raising these serious constitutional concerns, that may fairly be ascribed to [Title X].

Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 577 (1988).

The Secretary contends that a program that "characterizes abortion as a family planning option [by providing abortion counseling and referral] . . . has become a 'program[ ] where abortion is a method of family planning' " for purposes of section 1008 of the Act. R.B. 34. To make sense of this reading, the Secretary rewrites the statutory language in two ways. First, he reads the section to prohibit the funding of programs that "characterize[ ]," R.B. 34, or "treat[ ] abortion as a method of family planning," R.B. 34 n.38, while disregarding the statutory language itself, which prohibits funding only to "programs where abortion *is* a method of family planning." 42 U.S.C. § 300a-6 at J.A. 10. Second, the Secretary ignores Congress' explicit decision to fund a "broad range of . . . family planning . . . services," as well as "methods." 42 U.S.C. § 300(a) at J.A. 3. Instead, he reads section 1008 to deny funds to programs that provide a *service* that "treats" abortion as a family planning option, R.B. 34 n.38, rather than to exclude only programs that provide "abortion as a *method* of family planning." 42 U.S.C. § 300a-6 (emphasis added) at J.A. 10. But counseling and referral are not themselves *methods* of family planning. *See generally* P.B. 41-42.

In an effort to demonstrate that his strained reading of the statute is the only one that is "fairly possible," the Secretary points to a reference in the Conference Report to "preventive family planning services." *See* R.B. 35-36; *but see supra* Point IB. But the Secretary's suggestion that Congress intended information about options for coping with unwanted pregnancy to be neatly excised from all conversation between a doctor or counselor and a Title X patient seeking family planning information approaches the absurd. The specter of unwanted pregnancy is virtually the *raison d'etre* of a family planning clinic, "preventive" or otherwise. In this light, it is implausible that Congress did not view the provision of such information as an "informational . . . activit[y]" "related" to preventive family planning.[28]

Conceding that "the meaning of Section 1008 is less than completely clear," R.B. 40 n.45, the Secretary nevertheless argues that his construction of Title X must be upheld because it is permissible. R.B. 39-42.[29] But the General Accounting Office ("GAO") Report on which he relies is at best a "slim reed" of support, *Massachusetts v. HHS*, 899 F.2d at 63, for abandonment of the prior agency interpretation of Title X that expressly permitted nondirective abortion counseling and referral. *See generally* Exhibit C to P.B.

28 *See* H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. 8, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5081-82 ("*Conf. Rep.*") at 70a, *cited in* R.B. 6, 35-36. The Secretary further points to the statements of Congressman Dingell to the effect that Title X programs should not "encourage[ ] or promote[ ]" abortion. R.B. 36 (discussing statements at 116 Cong. Rec. 37375 (1970)). Even if the statements of one Congressman were sufficient authority for an interpretation of section 1008, *but see Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980), the statements relied upon by the Secretary in no way require or authorize regulations that clearly and deliberately proscribe even neutral, truthful, and factual information about abortion as an option for unwanted or medically contraindicated pregnancy. In any event, Congressman Dingell has disavowed the intent the Secretary ascribes to his words. J.A. 137-39.

29 Two courts of appeals have agreed that § 1008 is at best ambiguous, *PPFA* at A-9; *Massachusetts v. HHS*, 899 F.2d at 64, and have held that whether the regulations are a permissible construction of the statute is, at the very least, a "close question," *PPFA* at A-10; *Massachusetts v. HHS*, 899 F.2d at 64.

(detailing administration interpretation).[30] Indeed, the GAO, finding "no evidence that title X funds had been used for abortions or to advise clients to have abortions," *e.g.*, J.A. 84, actually recommended *not* that HHS abandon its longstanding interpretation, but that it codify its "position on the scope of . . . Section 1008" into regulations to insure that the policy would be adequately "communicated to all title X recipients." J.A. 88, 107, 121. Given the unprecedented dilemma the challenged regulations impose upon physicians, *see* ACOG *Amici* Brief at 11 (choice between civil liability, disciplinary consequences, and patient health on one hand and jeopardizing clinic survival on the other),[31] and the serious constitutional issues engendered by the Secretary's interpretation, the GAO Report should not sway this Court

30 The Secretary must concede that his present interpretation of agency policy reflects an abrupt reversal of prior, long-held agency opinion that the provision of neutral information and "mere" referral did not constitute promoting and encouraging abortion and were, therefore, permitted in Title X programs. *See* P.B. 47-48; Exh. C to P.B.; *see also* Appellant's Supplemental Brief at 24-25, *Massachusetts v. HHS*, 899 F.2d 53 (1st Cir. 1990) (*en banc*) (No. 88-1279) (noting that the agency had long read § 1008 "to limit a grantee's activities only if abortion were presented as a *preferred* method—*i.e.*, an encouraged or advocated method—of family planning") (emphasis in original).

31 To the argument that the regulations will require doctors to risk civil liability, *see* Exh. B to P.B.; Exh. B herein, the Secretary has offered only the flippant response that the Supremacy Clause permits him to supercede state tort law. *See* Pr., 53 Fed. Reg. 2933. However, an area of law " 'traditionally occupied by the states' " cannot be preempted absent a " 'clear and manifest' " expression of intent by Congress, *see English v. General Elec.*, 110 S. Ct. 2270, 2275 (1990) (citations omitted), not present in this case. *See Conf. Rep.* at 8-9 (Title X not intended to interfere with program run in accord with state law) at 70a; *see also Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985) ("presumption" against preemption on matters of "health"). Basic principles of federalism preclude an interpretation of Title X that runs roughshod over state law and requires state agencies to implement a federal campaign. *See generally Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 643-45 (1986). Indeed, 13 state Attorneys General plus the District of Columbia Corporate Counsel have filed an *amicus* in support of petitioners herein, *see* Br. of Celebrezze, Attorney General of Ohio, *et al. Amici Curiae* in Support of Petitioners, and 36 state health departments filed comments with HHS opposing the regulations. 141A.

from the alternative construction that may "fairly be ascribed to [Title X]"—one the agency had itself adopted for 17 years. *See DeBartolo*, 485 U.S. at 577; *see generally* Exh. C to P.B.

CONCLUSION

Petitioners respectfully ask this Court to reverse the judgment of the Second Circuit Court of Appeals and to invalidate the challenged regulations codified at 42 C.F.R. §§ 59.2, 59.8, 59.9, 59.10.

Dated: October 9, 1990

Respectfully submitted,

RACHAEL N. PINE
(Counsel of Record)
JANET BENSHOOF
LYNN PALTROW
KATHRYN KOLBERT
STEVEN R. SHAPIRO
LOUISE MELLING
JULIE MERTUS
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800 ext. 520

NORMAN SIEGEL
ARTHUR EISENBERG
CATHERINE WEISS
New York Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 382-0557

LAURENCE H. TRIBE
KATHLEEN M. SULLIVAN
PETER J. RUBIN
1525 Massachusetts Avenue
Cambridge, MA 02138

Of Counsel:

ROGER K. EVANS
Planned Parenthood Action Fund, Inc.
810 Seventh Avenue
New York, New York 10019
(212) 541-7800

LAURIE R. ROCKETT
Hollyer, Jones, Brady, Smith, Troxell, Barrett & Chira
342 Madison Avenue
New York, New York 10173
(212) 818-1110

EXHIBITS

EXHIBIT A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 88-2251

PLANNED PARENTHOOD FEDERATION OF AMERICA, PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, PLANNED PARENTHOOD ASSOCIATION OF UTAH, BOULDER VALLEY WOMEN'S HEALTH CENTER, MARILYN FOELSKI, M.D., PHILIP FREEDMAN, M.D., and KIRTLY JONES, M.D.,

Plaintiffs-Appellees,

—v.—

LOUIS SULLIVAN, M.D., individually and in his capacity as Secretary of the United States Department of Health and Human Services,

Defendant-Appellant.

Appeal from the United States District Court for the District of Colorado (D.C. Civil No. 88-z-158)

Alfred Mollin, Attorney, Appellate Staff, Civil Division, Department of Justice, Washington, D.C., (John R. Bolton, Assistant Attorney General; Michael J. Norton, United States Attorney; and John F. Cordes, Attorney, Department of Justice, Washington, D.C.; Of Counsel: Joel Mangel, Deputy Chief Counsel, Public Health Service; and Carol Conrad, Attorney, Office of the General Counsel, Department of Health and Human Services, with him on the briefs), for Defendant-Appellant.

Roger K. Evans (Dara Klassel and Beth Otten, also of Planned Parenthood Federation of America, Inc., New York, New York; Edwin S. Kahn and James W. Hubbell of Kelly/Haglund/Garnsey and Kahn, Denver, Colorado, with him on the brief) for Plaintiffs-Appellees.

Kent Masterson Brown, Lexington, Kentucky; Charles Onofrio, Denver, Colorado; and Clarke D. Forsythe, Americans United for Life Legal Defense Fund, Chicago, Illinois, filed an amici curiae brief on behalf of American Academy of Medical Ethics, Association of American Physicians & Surgeons, American Association of Pro Life Obstetricians & Gynecologists, American Association of Pro-Life Pediatricians, National Doctors for Life, Christian Medical Society, Christian Medical Foundation, Alabama Physicians for Life, Physicians for Moral Responsibility, National Association of Pro-Life Nurses, California Pro-Life Nurses Association, Georgia Nurses for Life, Indiana Nurses Concerned for Life, Missouri Nurses for Life, New York State Nurses for Life, Inc., Pennsylvania Nurses for Life, Rhode Island Nurses for Life, Washington Pro-Life Nurses Association, Southern Center for Law and Ethics, and Certain Fellows and Members of the American College of Obstetricians and Gynecologists and of the American Medical Association in support of Defendant-Appellant.

Paul Lewis, Denver, Colorado; James Bopp, Jr. and Richard E. Coleson of Brames, McCormick, Bopp & Abel, Terre Haute, Indiana, filed an amici curiae brief on behalf of Senator Gordon J. Humphrey and Congressmen Thomas J. Tauke, Thomas A. Luken, Thomas J. Bliley, Dan Coats, Christopher H. Smith, Henry J. Hyde, Alan B. Mollohan, and Vin Weber in support of Defendant-Appellant.

John H. Hall and Mary Sue Henifin of Debevoise & Plimpton, New York, New York; Of Counsel: Nadine Taub, Rutgers University School of Law, Newark, New Jersey; and Sarah E. Burns, Legal Director, NOW Legal Defense and Education Fund, New York, New York, filed an amici curiae brief on behalf of NOW Legal Defense and Education Fund,

National Abortion Rights Action League, American Association of University Women, Black Women's Agenda, Catholics for a Free Choice, Center for Population Options, Colorado Women's Bar Association, National Abortion Federation, National Council of Jewish Women, National Emergency Civil Liberties Committee, National Organization for Women, National Women's Conference Committee, National Women's Health Network, National Women's Political Caucus, Public Citizen Health Research Group, United Church of Christ, Women's Equity Action League, Women's Law Project, Young Women's Christian Association of Boulder County, Young Women's Christian Association of Metropolitan Denver, and Young Women's Christian Association of U.S.A. in support of Plaintiffs-Appellees.

Jack R. Bierig, David F. Graham, Lynn D. Fleisher and Richard D. Raskin, Sidley & Austin, Chicago, Illinois; Of Counsel: Kirk B. Johnson and Edward B. Hirshfeld, American Medical Association, Chicago, Illinois; Ann E. Allen, American College of Obstetricians and Gynecologists, Washington, D.C., filed an amici curiae brief on behalf of the American Medical Association, American College of Obstetricians and Gynecologists, and American Society of Human Genetics in support of Plaintiffs-Appellees.

Bruce S. Wolff, Charles S. Sims, Suzette Brooks and William S. Koenig of Proskauer, Rose, Goetz & Mendelsohn, New York, New York, filed an amici curiae brief on behalf of The American Public Health Association, The Association of State and Territorial Health Officers, The Association of Schools for Public Health, The American College of Physicians, The American Medical Student Association, The Association of Reproductive Health Professionals, The California Coalition of Nurse Practitioners, The Colorado Academy of Family Physicians, The Colorado Department of Health, Colorado Physicians for Choice, Colorado/Wyoming Chapter of the American College of Nurse Midwives, The Intermountain Medical Society, The Maryland Department of Health and Mental Hygiene, The National Association of Nurse Practitioners in Family Planning, The National Urban

League, The Nurses Association of the American College of Obstetricians and Gynecologists, The Ohio Department of Health, The South Dakota State Department of Health, The Wisconsin Nurse Practitioners in Reproductive Health, and Dr. Allan Rosenfield, Dean of the Columbia University School of Public Health in support of Plaintiffs-Appellees.

Cynthia P. Delaney, Leanne B. DeVos, Karen H. DuWaldt, Diana Terry Reindl, and Kathleen Yurchak, American Civil Liberties Union Foundation of Colorado, Denver, Colorado, filed an amicus curiae brief on behalf of American Civil Liberties Union in support of Plaintiffs-Appellees.

David M. Becker and Virginia A.S. Kling of Wilmer, Cutler & Pickering, Washington, D.C., filed an amici curiae brief on behalf of Representative Bill Green, Senators Barbara A. Mikulski, Lowell P. Weicker, Jr., Brock Adams, John H. Chafee, Alan Cranston, Howard M. Metzenbaum, Paul Simon, Robert T. Stafford, William S. Cohen, Daniel J. Evans, Bob Packwood, and Timothy E. Wirth, and Representatives Daniel K. Akaka, Les AuCoin, Julian C. Dixon, Vic Fazio, William H. Gray III, Steny H. Hoyer, William Lehman, Robert J. Mrazek, John Edward Porter, Martin Olav Sabo, Henry A. Waxman, Jim Bates, Rick Boucher, Cardiss Collins, Mickey Leland, James H. Scheuer, Ron Wyden, Gary L. Ackerman, Chester G. Atkins, Anthony C. Beilenson, Howard L. Berman, Sherwood L. Boehlert, Don Bonker, Barbara Boxer, George E. Brown, Jr., Albert G. Bustamante, Benjamin L. Cardin, Thomas R. Carper, George W. Crockett, Jr., Peter A. DeFazio, Ronald F. Dellums, Mervyn M. Dymally, Don Edwards, Lane Evans, Dante B. Fascell, Walter E. Fauntroy, Barney Frank, Bill Frenzel, Robert Garcia, Sam Gejdenson, Benjamin A. Gilman, Charles A. Hayes, James M. Jeffords, Nancy L. Johnson, Robert W. Kastenmeier, Joseph P. Kennedy II, Peter H. Kostmayer, Richard H. Lehman, Sander M. Levin, Mel Levine, John Lewis, Mike Lowry, Matthew G. Martinez, Robert T. Matsui, George Miller, John R. Miller, Jim Moody, Constance A. Morella, Bruce A. Morrison, Stephen L. Neal, Nancy Pelosi, Claude Pepper, Charles B. Rangel,

Marge Roukema, Claudine Schneider, Patricia Schroeder, Christopher Shays, David E. Skaggs, Louise M. Slaughter, Lawrence J. Smith, Olympia J. Snowe, Stephen J. Solarz, Pete Stark, Gerry E. Studds, Edolphus Towns, Morris K. Udall, Ted Weiss, Alan Wheat, and Howard Wolpe in support of Plaintiffs-Appellees.

Before

LOGAN, MOORE and BALDOCK, Circuit Judges.

LOGAN, Circuit Judge.

This appeal arises out of an action brought by organizations and physicians receiving funds under Title X of the Public Health Service Act, 42 U.S.C. §§ 300 to 300a-6, who challenge, on behalf of themselves and their patients, the 1988 amendments to the regulations under which Title X funds are administered. *See* 53 Fed. Reg. 2922, 2943-46 (1988) *codified at* 42 C.F.R. §§ 59.2, 59.5, 59.7-59.10. The new regulations prohibit Title X participants from advising women about abortion as a medical option if birth control devices should fail or if they are already pregnant, and the regulations require physical, financial, and personnel separation of Title X supported facilities from any others that counsel about or perform abortions.

The district court entered a preliminary and then a permanent injunction against implementation of the new regulations. *Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465 (preliminary injunction) and 687 F. Supp. 540 (permanent injunction) (D. Colo. 1988). The district court ruled that the regulations violate the intent of Congress as expressed in the statute, informed by its contemporaneous and subsequent legislative history. 680 F. Supp. at 1468-73; 687 F. Supp. at 542. It also held that the regulations violate the constitutional rights of the women patients and their advising physicians. 680 F. Supp. at 1473-78; 687 F. Supp. at

542-44. On appeal the Secretary of Health and Human Services challenges all of these rulings.

Two other federal courts of appeals have faced the precise issues before us. A divided panel of the Second Circuit upheld the 1988 regulations against both statutory and constitutional challenges, *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989), *cert. granted*, 58 U.S.L.W. 3753 (U.S. May 21, 1990) (Nos. 89-1391, 89-1392). The First Circuit, en banc with one dissent, struck down the new regulations in their entirety, principally on constitutional grounds. *Massachusetts v. Secretary of Health & Human Services*, 899 F.2d 53 (1st Cir. 1990) (en banc). That court concluded that of the 1988 amendments, only 42 C.F.R. § 59.9 was invalid as inconsistent with Congress' intent as expressed in Title X or on other nonconstitutional grounds. But the court held that all of the amendments violated the constitutional rights of women to make informed decisions concerning abortion, and violated the consulting physicians' First Amendment rights to properly advise their patients.

We find ourselves in agreement with the First Circuit's analysis, and we join it in holding the regulations invalid.

I

Congress enacted Title X of the Public Health Service Act, 42 U.S.C. §§ 300-300a-6, in 1970. The act authorizes the Secretary of Health and Human Services "to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." *Id.* § 300(a). Section 1008 of that act provides that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." *Id.* § 300a-6. Grants and contracts under Title X are to be made "in accordance with such regulations as the Secretary may promulgate." *Id.* § 300a-4.

Title X funds have never been permitted to be used either to perform or to subsidize actual abortions. *See* 42 C.F.R. §§ 59.5(a)(5), 59.9 (1986). Almost since its enactment, however, the administrative interpretations permitted, and, since 1981, required Title X projects to provide nondirective counseling and referrals to pregnant women about all legally available medical options, including abortion. 53 Fed. Reg. 2923 (1988). This policy was reversed abruptly in 1988 by the promulgation of the regulations now under attack.

In the new regulations, § 59.2 redefined the term "family planning" to refer solely to preconceptual services, explicitly excluding pregnancy care and abortion. Sections 59.7 and following were rewritten entirely. Section 59.8(a)(1) expressly prohibits Title X projects from providing counseling concerning abortion or referrals for abortion. Section 59.8(a)(2) states that once a Title X project client is diagnosed as pregnant she "must be referred for appropriate prenatal and/or social services" by giving her a list of providers that promote welfare of mothers and unborn children, and she "must also be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept." She may be referred for emergency care. But § 59(a)(3) says that the project may not use emergency referrals as an "indirect means of encouraging or promoting abortion" by weighing referrals in favor of providers that perform abortions, by including on the list of referrals any providers whose principal business is providing abortions, by excluding providers who do not perform abortions, or by "steering" women to providers who offer abortions. Subsection (4) states that the project can provide the woman with medical information necessary to assess the risks of different methods of contraception, but cannot include counseling with respect to abortion.

Examples of proper and improper actions by Title X providers are set out in § 59.8(b). A pregnant woman requesting prenatal care must be referred to appropriate providers of prenatal care services. *Id.* § 59.8(b)(1). But a pregnant woman who asks for a list of abortion providers may not be given a list that includes any clinic which "principally" pro-

vides abortion, or a list that includes hospitals and clinics which provide abortion in addition to prenatal care, unless providers of prenatal care in the area that do not provide or refer for abortions are also included on the list. *Id.* § 59.8(b)(3) & (4). The Title X project is expressly prohibited from referring a pregnant woman to an abortion provider, even upon specific request, and apparently must tell one making such an inquiry that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." *Id.* § 59.8(b)(5).

Section 59.9 states specifically that Title X projects have to be so organized that they are "physically and financially separate" from prohibited abortion activities. This requires that the Title X project must have an "objective integrity and independence from prohibited activities;" mere bookkeeping separation is not sufficient. *Id.* The objective integrity and independence is based on factors that include, but are not limited to, separate accounting records, separate facilities, separate personnel, and absence of material promoting abortion. *Id.*

Section 59.10(a) prohibits "actions to assist women to obtain abortions or increase the availability or accessibility of abortion." Specific examples of prohibited activities include lobbying for legislation increasing the availability of abortions, giving patients brochures advertising an abortion clinic, or making an appointment for a pregnant woman with an abortion clinic.

II

Although the Secretary admits that the 1988 regulations are a result of a shift in political climate and represent a significant departure from the policy of the first seventeen years of Title X grants, see *New York*, 889 F.2d at 418 (Kearse, J., dissenting), he defends the regulations as more consistent with the proper interpretation of Title X than the earlier practice. Thus, we determine first whether the 1988 changes

in the regulations are permissible under the statute, apart from their constitutionality.

The words of the statute are paramount, of course, and we must give effect to the "unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Each of the circuit courts that have considered the question have found the language of § 1008 of the Act, 42 U.S.C. § 300a-6, that no funds appropriated "shall be used in programs where abortion is a method of family planning," is not free from ambiguity. These courts then appropriately considered the contemporaneous and subsequent legislative history and past administrative interpretations of the section. *See Consumer Prods. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108-120 (1980). They found the contemporaneous legislative history ambiguous for the most part, although the First Circuit relied upon it to invalidate the new 42 C.F.R. § 59.9, requiring separation of facilities. *See Massachusetts*, 899 F.2d at 59-60. These decisions also considered the subsequent legislative history in the context of the long-standing administrative construction. In the end, however, both circuits, except for *Massachusetts'* ruling on § 59.9, held that the changes in the regulations were not beyond the power of the Secretary under the statute.

We agree that the language of 42 U.S.C. § 300a-6 is ambiguous in that it does not resolve the issues presented in the challenged regulations. Moreover, the contemporaneous legislative history does not address whether clinics receiving Title X funds can engage in nondirective counseling including the abortion option and referrals, upon patient request. While there has been some recent erosion of the federal courts' practice of consulting "longstanding and consistent" agency interpretations and some of the other techniques for parsing legislative history that we have used to ascertain whether a statute commands a particular result, the Supreme Court decisions have continued to rely on the "traditional tools of statutory construction" in determining congressional intent on "the precise question at issue," *Chevron*, 467 U.S. at 843 n.9; *See NLRB v. United Food & Commercial Work-*

ers, 484 U.S. 112, 123 (1987); *INS v. Cardozo-Fonseca*, 480 U.S. 421, 446 (1987). We have considered all of those traditional tools, but do not discuss them in any detail because we can add little to the *Massachusetts* court's analysis of the statute and the relevant interpretative history.

Like the *Massachusetts* court, we find that the propriety of the regulatory changes is a close question—largely because of many years of consistent administrative interpretation, with six reenactments of parts of Title X, and numerous reappropriations, during which unsuccessful attempts were made at statutory amendment to change the practice of counseling and referrals for abortion on this highly visible and controversial matter. *See Bob Jones University v. United States*, 461 U.S. 574, 599-602 (1983) (agency interpretation of statute confirmed or ratified by subsequent congressional failure to change it). In the end, however, we agree with the *Massachusetts* court that, except for new 42 C.F.R. § 59.9, the amendments are not statutorily impermissible.

Title X clearly directs the Secretary to administer a grant program to promote family planning under a statute that delegates to him some discretion with an admonition not to fund abortions. Supreme Court decisions have held that when the mandate of Congress is ambiguous we must defer to any reasonable interpretation by the agency. *See, e.g., NLRB v. Curtin Matheson Scientific, Inc.*, 58 U.S.L.W. 4407, 4411 (U.S. Apr. 17, 1990) (No. 88-1685); *United Food & Commercial Workers Union*, 484 U.S. at 123; *Chevron*, 467 U.S. at 844. This rule applies even when the agency is changing a prior interpretation. *E.g., Curtin Matheson*, 58 U.S.L.W. at 4411; *Chevron*, 467 U.S. at 864-64; *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *American Trucking Ass'ns, Inc. v. Atchison, Topeka & S.F. Ry Co.*, 387 U.S. 397, 416 (1967). That the interpretation is long-standing is not significant unless we can comfortably conclude that a majority of Congress intended the prior interpretation to be frozen into law, a conclusion we cannot reach here. *See Motor Vehicle Mfrs.*, 463 U.S. at 45.

The Secretary must justify his change of interpretation with "a reasoned analysis," *Motor Vehicle Mfrs.*, 463 U.S. at 42, 57. In a lengthy discussion in the Federal Register, the Secretary argued that the new regulations are more in keeping with the original intent of the statute, justified by client experience under the prior policy, supported by a shift in attitude against "elimination of unborn children by abortion," 53 Fed. Reg. at 2944, and consistent with a change in policies by a new political administration. Whether or not we personally would approve of these changes, the agency has sufficiently justified them and we therefore cannot rule them to be arbitrary and capricious. *See Chevron*, 467 U.S. at 865.

The one exception is 42 C.F.R. § 59.9, which requires an amount of physical, financial, and personnel separation between Title X funded activities and any counseling mentioning abortion that would seem to put out of business many current grantees. All of the Title X grantees must provide at least ten percent nonfederal "matching funds," 42 U.S.C. § 300a-4(a). Most provide significantly more than that; federal funds apparently account for only about fifty percent of the money received by Title X grantees. *Massachusetts*, 899 F.2d at 56. One of the plaintiffs in the case before us is a physician in private practice who handles Title X patients in his office, I R. tab 1 ¶ 10; that doctor performs abortions for private, paying patients, *id.* tab 2, Decl. Sylvia Clark. The new § 59.9 clearly prohibits continued Title X funding to that doctor, despite the fact that he is not providing abortion services for Title X patients. Quite apart from the constitutional problems, we agree with the *Massachusetts*, court, 899 F.2d at 59-60, and the district court below, 680 F. Supp. at 1468-69, that the new § 59.9 has the effect of restricting the number of permissible grantees beyond the intent of Congress as expressed in 42 U.S.C. §§ 300, 300a and Title X as a whole. Although it was not enacted as a part of Title X, 42 U.S.C. § 300a-7 lends support to our holding. This provision had its origin as a measure to prevent discrimination against those who will not perform abortions, but clearly states a general nondiscrimination policy applicable to all grants under the Public Health Service Act, of which Title

X is a part. That section requires that no personnel decisions be made on the basis of either "reluctance or willingness" to counsel or perform abortions. *Id.* § 300a-7(d). When the anti-discriminatory provisions are considered along with the statements in Title X of an intent to provide a "broad range" of services, 42 U.S.C. § 300(a), taking into account the extent "services are needed locally," *id.* § 300(b), that "priority will be given . . . to furnishing such services to persons from low-income families," *id.* § 300a-4(c)(1), with suitable "informational or educational materials" made available to the targeted population, *id.* § 300a-4(d)(1), we believe it violates congressional intent to deny the issuance of Title X grants solely because the grantee is not sufficiently funded to meet the separation requirements of 42 C.F.R. § 59.9.

III

We turn now to the constitutional issues raised by plaintiffs and passed upon by the district court. The important threshold question is whether the instant situation in controlled by the line of cases commencing with *Maher v. Roe*, 432 U.S. 464 (1977), which held that a government constitutionally may encourage childbirth over abortion by funding only prenatal and childbirth expenses. The Court found that the carrot of state aid, which might induce an indigent woman to carry to term rather than abort, was not the equivalent of a state-created obstacle in the woman's path to an abortion. *Id.* at 474, 477 n.10.

In *Harris v. McRae*, 448 U.S. 297 (1980), the Court held that the United States government's refusal to fund an indigent woman's medically necessary abortion, when it would pay the costs of her bearing the child, did not violate her constitutional rights. The Court reasoned that her freedom of choice does not carry with it a constitutional entitlement to the money necessary to avail herself of the full range of protected choices; "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." *Id.*

at 316. A year ago, the Supreme Court upheld, on the same reasoning, the right of a state to prohibit the use of state funds or state facilities to perform abortions; "Missouri's refusal to allow public employees to perform abortions in public hospitals leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all. The challenged provisions only restrict a woman's ability to obtain an abortion to the extent she chooses to use a physician affiliated with a public hospital." *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3052 (1989).

Although the instant case bears superficial resemblance to the *Maher* line of decisions—a governmental choice to use its funds to promote childbirth over abortion—there are significant differences which we believe make those cases inapposite. The government, of course, has not gone so far as to socialize medicine and publicly fund all hospitals and physicians, a situation the *Webster* decision said might require a different analysis. 109 S. Ct. at 3052 n.8.[1] But it has set up a funding system by which approximately 4,000 entities, including state governments, have been induced to become Title X grantees by offers of up to ninety percent federal funding. The Secretary has admitted that the projects serve approximately 1,000,000 adolescent women. 53 Fed. Reg. at 2944. The total number of women served is no doubt much greater.

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1 *Webster* also expressed reservation regarding the constitutionality of a state's denying use of public facilities to doctors who perform abortions for private patients at private facilities. 109 S. Ct. at 3052 n.8. Such a situation is analogous to the regulations before us now, because the regulations deny public funding to grantees who perform or counsel concerning abortions, even for private, non-publicly funded patients. *See* 53 Fed. Reg. 2922 ("[S]ection 1008 [42 U.S.C. §300a-6)] extends to all activities conducted by the federally funded project, not just the use of federal funds for abortions within the project."); 53 Fed. Reg. 2927 ("The Department's concern is that all funds allocated to the Title X program or project—whether they are direct Title X grant funds, program or grant-related income, or matching [private] fund [sic]—be spent in compliance with Section 1008 and that the program be separate and distinct from prohibited abortion activities.").

> "It has been said that Title X, as the single largest federally-funded family planning program, serves 4.3 million people: its targeted population consists of an estimated 14.5 million women at risk of unintended pregnancy, including 5 million adolescents between the ages of 15 and 19, and 9.5 million adult women between the ages of 20 and 44, all of whom have an income 150 percent below the poverty level."

New York, 889 F.2d at 415 n.1.

The record establishes that many women who visit these Title X providers do so because they suspect they are pregnant; the clinic provides pregnancy testing, and many are indeed found to be pregnant. Had the regulations directed that once pregnancy is established the clinic must say, "Go away, we only give advice on prepregnancy planning," then it might be said the government has done no more than subsidize a permissible activity. The regulations, however, require the clinic to go one step further in its treatment of the patient. When a patient is diagnosed as pregnant she *must* be provided with both referrals to prenatal service providers and with interim information on prenatal care. 42 C.F.R. § 59.8(a)(2). Even if the patient specifically requests information on abortion, the clinic is not permitted to advise her about it. We can summarize this no better than did Judge Kearse in her dissent in *New York*:

> "There can be no doubt that the Secretary intends this regulation to forbid a grantee from informing a pregnant woman of the availability of abortion and even from telling her where she can get abortion-related information. For example, though the regulations permit a grantee to give the woman a list of prenatal-care service providers that might also offer abortions, the list must comply with several requirements. It *must* include any available prenatal-care providers that *do not* perform abortions; it *cannot* include providers that offer abortions as their 'principal business'; and it cannot 'weigh[ ]' in favor of abortion providers. 42 C.F.R. § 59.8(a)(3). The grantee is not allowed to inform the

> woman which providers on the list, in addition to offering prenatal care, also perform abortions. Rather, care providers that also perform abortions may be included only if '*the referral* is *specifically* made to the providers of *prenatal* care services.' 53 Fed. Reg. 2922, 2938 (1988). Indeed, the grantee is required to inform the client about care to preserve the unborn fetus. Section 59.8(a)(2), for example, provides that 'once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services *by furnishing a list of available providers that promote the welfare of mother and unborn child.*'
>
> . . . In addition to the regulations discussed above, for example, § 59.8(b)(4) provides that when a woman asks for a list of abortion providers, the grantee is not permitted to give her a list that includes entities whose principal business is abortion, or a list that does not include 'providers of prenatal care in the area which *do not* provide or refer for abortions.' In contrast, § 59.8(b)(5) provides that when a women asks for information on abortion, the grantee is permitted to 'tell[ ] her that the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion'; it is permitted to 'tell[ ] the client that the project can help her to obtain prenatal care and necessary social services, and provide[ ] her with a list of such providers from which the client may choose.'
>
> Thus, the express prescriptions and proscriptions in the regulations require the grantee to emphasize prenatal care and prohibit it from identifying any entity as a provider of abortions. Plainly, the regulations facially discriminate on the basis of viewpoint and control the content of the grantee's permitted speech."

889 F.2d at 415-16 (emphasis in original).

If we could conclude that the pregnant women who are patients of Title X clinics are knowledgeable about their abortion option, or will seek advice from doctors not fettered by the Title X regulations, then we might conclude that *Maher* controls, because poverty alone does not give a woman the right to government-funded benefits. But it seems clear that government funding, which fuels virtually all "birth control" clinics in the nation, lures poverty-level women to these clinics for pregnancy testing, medical advice, and referrals to other health care providers. The promise of the clinics, and their goal under law, is to provide "comprehensive voluntary family planning services" upon request. H.R. Rep. No. 572, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 5068, 5075. Fees for the services are determined on a sliding scale, based on the woman's income. Absent a warning that the advice given at Title X clinics is incomplete, many patients no doubt will rely, without obtaining a second opinion, on the advice given them. At least many of the poorest, most naive and ignorant women—who are the persons targeted by Title X—will rely on that information.[2] Thus, by denying Title X providers the right to mention abortion, to refer to abortion as an option, or to provide professional referrals to others whom they know will counsel about all medical options that are legal, including abortion, the goverment has placed a state-created "obstacle in the path of a woman's exercise of her freedom of choice." *Harris*, 448 U.S. at 316.[3]

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2 Of course, the Secretary is in fact anticipating that women will rely on the information provided and will not therefore either need or desire abortions. *See* 42 C.F.R. § 59.2 ("[A]bortion may not be included as a method of family planning in the Title X project. Family planning, as supported under this subpart, should reduce the incidence of abortion."); 42 C.F.R. § 59.8(b)(5) (example of pregnant woman who requests information on abortion providers and is given only prenatal care referrals). Information and referrals are an integral part of the services envisioned in the regulations. 53 Fed. Reg. 2923.

3 We will not assume, as the government apparently does, Appellant's Brief at 44 n.38, that the effect of the Title X provider's failure to mention abortion is mitigated or eliminated by a woman's access to abortion informa-

We must examine whether that obstacle, the government's provision of intentionally incomplete information, violates any constitutional right previously recognized by the Supreme Court. Of course, under current law a pregnant woman in the first stages of pregnancy has a federal constitutional right to an abortion. *Roe v. Wade*, 410 U.S. 113 (1973). Even if *Roe* is overruled, it means only that the existence of the right to an abortion is left to the political process, probably to the states. No doubt some states would continue to permit abortions, and a pregnant woman in a state forbidding abortions, by virtue of her right of travel to another state, in theory at least still would be able to secure a legal abortion. Thus abortion is currently a legally permissible option for a woman in the early stages of pregnancy, and it will likely remain so.

Because patients at a Title X clinic are invited to consult its physicians and are given intentionally incomplete medical advice, which they reasonably can be expected to follow, we think this case falls squarely within the prohibition in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), and *City of Akron v. Akron*

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tion from other sources. In fact, a provider's failure to mention abortion as a legal option, in the context of an otherwise neutral medical consultation, could well cause the woman to conclude that abortion is not a legal or medical option for her under the circumstances. Many states have recently undertaken measures to modify their abortion laws, which efforts receive extensive media attention. *See* "States Testing the Limits on Abortion," *N.Y. Times*, April 2, 1990, at A14, col. 4 (citing 100 then-pending abortion bills; fourteen floor votes on abortion bills since *Webster*). One reason women might seek information about their medical options at a family planning clinic is the confusion that arises from the barrage of bills introduced, passed, vetoed, or stayed by judicial action. *See, e.g., id.* (Guam, Pennsylvania, and South Carolina laws restricting access to abortion stayed in court actions; Idaho bill restricting abortion passed by legislature but vetoed by the governor); "Maryland Legislature Halts an Abortion Move," *id.*, March 24, 1990, at A7, col. 1 (Maryland legislature rejects public referendum to decide which of two conflicting abortion bills becomes law). The two decisions issued at the end of the most recent Supreme Court term, *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990) and *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990) (upholding parental notification statutes), are unlikely to reduce the legislative activity or women's confusion about their medical options.

Center for Reproductive Health, Inc., 462 U.S. 416 (1983), against state intrusion into the advice a woman requests from or is given by her doctor. However *Webster*, *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990), and *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990), may have affected aspects of the *Thornburgh* and *Akron* decisions, we see nothing to diminish *Akron's* holding that

> "because abortion is a medical procedure, . . . the full vindication of the woman's fundamental right necessarily requires that her physician be given 'the room he needs to make his best medical judgment.' The physician's exercise of this medical judgment encompasses both assisting the woman in the decisionmaking process and implementing this decision should she choose abortion."

462 U.S. at 427 (citations omitted).[4] Stating that "it remains primarily the responsibility of the physician that appropriate information is conveyed to his patient," the Court struck down government-imposed abortion regulations "designed to influence the woman's informed choice between abortion or childbirth." *Id.* at 443-44. "The State's intent is in ensuring that the woman's consent is informed and unpressured; the critical factor is whether she obtains the necessary information and counseling from a qualified person." *Id.* at 448.

These principles were reaffirmed in *Thornburgh*, 476 U.S. at 760, 762. Indeed, *Thornburgh* condemned state rules that structured and slanted the dialogue between the physician and the pregnant patient in language that seems precisely applicable to the situation at bar:

> "Forcing the physician or counselor to present the materials [discouraging abortion] and the list [including agencies offering alternatives to abortion] to the woman makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list. All this is, or comes close to being, state medicine imposed upon the woman, not the professional medical guidance she seeks, and it officially structures—as it obviously was intended to do—the dialogue between the woman and her physician."

476 U.S. at 763 (citation omitted).

Again, we cannot improve upon the following statement in Judge Kearse's dissent in *New York* concerning the effect on the woman's constitutional rights:

> "The regulations at issue here prohibit the physician in a Title X facility from communicating to his patient frank and complete advice if it involves consideration of abortion. They require him, in referring his patient to other health-care providers, to identify only prenatal-care facilities. If his pregnant patient raises the subject of abortion, he is required to tell her that he cannot give her any advice or counseling on the subject. If she asks where she can get information, the regulations prohibit even an informative response.
>
> . . .
>
> Unlike the regulatory schemes in such cases as *Harris* . . . and *Maher* . . . in which the regulating authority was found merely to have refused to extend an affirmative benefit to women who freely chose abortion, but not to have placed obstacles in the way of an informed choice, the Secretary's regulations here plainly interfere with the pregnant woman's freedom to decide which course of action she prefers. In some cases, the information ban will delay the appropriate education of the patient to such an extent that she is denied any genuine choice. In some cases, the patient will never be fully informed, for as the Secretary has acknowledged, '[f]or many clients, family planning programs are their only continuing source of health information and medical

4 The Supreme Court's recent *Ohio* opinion, while approving a state requirement that a physician inform one parent when a minor patient is considering abortion, continues to recognize the importance of the advice of a detached physician with full information. *Ohio*, 110 S. Ct. at 2983.

care.' U.S. Dep't of Health and Human Services, *Program Guidelines for Project Grants for Family Planning Services* § 9.4 (1981). These regulations prevent such a program from giving the client any substantive information regarding abortion as an option; if she asks where she may obtain such information, her Title X physician is prohibited from telling her.

By prohibiting the delivery of abortion information and prohibiting communication even as to where such information can be obtained, the present regulations deny a woman her constitutionally protected right to choose. She cannot make an informed choice between two options when she cannot obtain information as to one of them."

889 F.2d 416-17.

Although the matter has received little separate attention in court opinions to this point, the limitations placed on Title X physicians in communicating with their patients, and the referral obligations imposed upon them, violate the constitutional rights of the physicians themselves. The dearth of attention may be because the physicians' rights are considered derivative from the rights of the patient. *See Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977); *Harris*, 448 U.S. at 318 n.21. In the context of a right to advice in the confidential physician-patient relationship, physicians' rights would seem to be entirely coextensive with those of their patients, and if the patient's constitutional rights are violated so are the physician's. Nevertheless, a separate discussion of the physicians' position illuminates their predicament under the 1988 regulations and strengthens our belief that the new regulations must fail.

Physicians, of course, need not accept employment with grantees of Title X funds if they do not wish to abide by the limitations upon the advice they may give patients; presumably physicians already working for such organizations may quit if they do not like the regulations, although breaking contracts of employment might render them liable for damages. Even so, it is a well-established principle that, although the government has no responsibility to provide funds for a

program, it may not condition participation in a program it does fund upon a waiver of constitutional rights. This is set forth clearly in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), as follows:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."

This principle applies fully to employment situations. Individuals may not be required to abandon their constitutional rights to free speech or due process to obtain employment. *Id.* at 597.

The canons of ethics of the medical profession require physicians to give patients advice that includes abortion as an alternative to carrying a pregnancy to term when the patient's health condition warrants.[5] The health hazards of abortion in a particular instance may be less than the health hazards of carrying the pregnancy to term. One study comparing mortality statistics from abortion and childbirth concluded that "[i]n terms of dying, abortion through the 15th week of pregnancy is at least tenfold safer than childbearing." Cates,

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5 The American Medical Association Standards regarding informed consent state that physicians may refer patients to "any other provider of health care services permitted by law to furnish such services, whenever he believes that this may benefit the patient." *Current Opin. of Council on Ethical & Judicial Affairs of the American Medical Association—1986*, ¶ 304; *see also id.* ¶ 807 ("physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice"); American College of Obstetricians & Gynecologists (ACOG), *Standards for Obstetric-Gynecologic Services* 57 (1985) (in event of unwanted pregnancy the physician should counsel patient of abortion option); ACOG, *Statement of Policy: Further Ethical Considerations in Induced Abortion* (Dec. 1977) ("Counseling directed solely toward either promoting or preventing abortion does not sufficiently reflect the full nature of the problem or the range of options to which the patient is entitled.").

Smith, Rochat & Grimes, *Mortality from Abortion and Childbirth*, 248 *J. Am. Med.* A. 192, 196 (July 9, 1982).

The amended regulations, particularly 42 C.F.R. §§ 59.8-(a)(1) & (4) and 59.10(a), appear to prohibit physicians paid with Title X funds from advising women about the alternative of abortion even when carrying the baby to full term would involve grave risks for the mother. The regulations, particularly § 59.8(a)(2), appear to require Title X physicians to provide pregnant patients with literature from health care providers who will not perform abortions or counsel abortion as an option, and to forbid those physicians from referring pregnant patients to health care providers who will provide such services. In complying with the regulations, in theory at least, the physician risks censure and loss of his right to practice because of his failure to give impartial and full advice.

To condition receipt of Title X funds upon physicians' promises not to give advice that the standards of their profession require them to give implicates the physicians' First and Fifth Amendment rights. *See, e.g., Thornburgh*, 476 U.S. at 763; *Akron*, 462 U.S. at 445; *Frieman v. Ashcroft*, 584 F.2d 247, 251-52 (8th Cir. 1978); *aff'd men..*, 440 U.S. 941 (1979). This conclusion also does not depend on the continued efficacy of *Roe v. Wade* because, for the reasons already stated, for most women abortion would continue to be a legal alternative that physicians must be free to discuss with their patients.

For the reasons stated, we hold that the regulations violate the Title X providers' and the women patients' First and Fifth Amendment rights. We AFFIRM the permanent injunction issued against the implementation of the challenged amendments to the regulations.

BALDOCK, Circuit Judge, dissenting in part.

With the apparent exception of the separation requirements contained in 42 C.F.R. § 59.9,[1] the court today holds unconstitutional the 1988 amendments to the HHS regulations, 42 C.F.R. §§ 59.1-59.17, designed to implement the purpose of Section 1008 of Title X of the Public Health Services Act, 42 U.S.C. § 300a-6. According to the court, the limitations placed upon Title X recipients by the regulations, namely § 59.8, facially violate a pregnant woman's fifth amendment right to choose abortion and her physician's first amendment right to speak frankly about abortion. Because Supreme Court precedent dictates a contrary result, I dissent.

1 In part II of its opinion, the court holds § 59.9 invalid as contrary to Congressional intent. Court's Opinion at 12-13. I agree. The aim of Title X is to increase and improve family planning services to indigents in cooperation with existing state and private programs. In enacting Title X, Congress did not intend "to restrict the types of projects with which a Title X recipient could associate, or to place limitations on the physical proximity or the sharing of personnel between Title X projects and unrelated programs which may provide abortion services." *Commonwealth of Mass. v. Bowen*, 679 F. Supp. 137, 143 (D. Mass. 1988), *aff'd*, 899 F.2d 53 (1st Cir. 1990), *cert. pending*, No. 89-1929 (June 8, 1990). Because I concur fully in the court's statutory resolution of the challenged regulations, neither I nor the court have occasion to address § 59.9's constitutionality. *See Harris v. McRae*, 448 U.S. 297, 306-07 (1980) (where case may be decided on either statutory or constitutional basis, court should decide case on statutory basis and avoid constitutional adjudication). Since the court, however, assumes the severability of § 59.9 from the remaining regulations, the constitutionality of those regulations is at issue. *See Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (statutory severability).

I.

The court reasons that *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), and *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), control the outcome of this case. Court's Opinion at 20. In those cases, however, the Supreme Court struck down "informed consent" laws that required *all* doctors within their respective jurisdictions to provide *all* pregnant patients contemplating abortion with a litany of information, regardless of whether the patient sought the information or her doctor thought the information necessary to the patient's decision to abort. *Thornburgh* and *Akron* had nothing to do with a governmental decision to encourage

childbirth and discourage abortion through the funding of services relating to the former and not the latter.

The possibility that the HHS regulations will discourage some women from having an abortion is hardly sufficient to invalidate those regulations on their face.[2] *See Thornburgh*, 476 U.S. at 829 (O'Connor, J., dissenting). *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989), *Harris v. McRae*, 448 U.S. 297 (1980), and *Maher v. Roe*, 432 U.S. 464 (1977), all support the view that the allocation of government monies to encourage childbirth over abortion does not unduly burden a woman's right to seek an abortion or place a governmental obstacle in the path of a woman's choosing to have an abortion. Yet this court rejects this line of decisions as bearing only a "superficial resemblance" to the instant case. Court's Opinion at 14.

Roe v. Wade, 410 U.S. 113 (1973), imposes "*no* limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." *Maher*, 432 U.S. at 474 (emphasis added). Section 59.8's restrictions on abortion counseling and referrals for Title X recipients leaves a pregnant woman with essentially the same choice as if the government had chosen not to provide Title X grants at all. Admittedly, this analysis might differ if the government had socialized medicine, *see Webster*, 109 S. Ct. at 3052 n.8, but the government has not. At this point, the regulations interfere with a woman's ability to obtain an abortion only if she seeks an abortion with the assistance of Title X funds. *See id.* at 3052. The inability of an indigent woman to obtain an abortion would be no less in the absence of Title X. *See Harris*, 448 U.S. at 316. Accordingly, the HHS regulations do not infringe upon a woman's right to abortion.

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2 A facial challenge to the regulations is a most difficult challenge since the challenger must establish that the regulations would be invalid under all circumstances. That the regulations might operate unconstitutionally under some scenario is insufficient to render the regulations invalid on their face. *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3060 (1990) (O'Connor, J., concurring).

II.

The regulations, however, undoubtedly infringe upon the doctor-patient relationship by limiting the free flow of information from the doctor to the patient regarding abortion services. As Judge Cardamone stated: "[A] Title X physician's hands are tied with respect to the response he or she may give to a patient seeking abortion information. . . . [The regulations] constitute[ ] a trap for the mostly unsophisticated and unwary patients, and jeopardizes the ability of Title X physicians to safeguard the health of those people seeking their expert advice." *State of New York v. Sullivan*, 889 F.2d 401, 415 (2d Cir. 1989) (Cardomone, J., concurring), *cert. granted*, 110 S. Ct. 2559 (1990).

A physician certainly has a common law duty to discuss matters openly and frankly with the patient. *See Smith v. Cote*, 513 A.2d 341, 355 (N.H. 1986) (Souter, J., concurring) (physician's timely disclosure of professional limits based on moral scruples combined with timely referral to physician not so constrained may be sufficient defense in action for failure to advise). Yet the Constitution provides little protection for the "dialogue" a physician undertakes in the course of treating a patient. *Thornburgh*, 476 U.S. at 802 (White, J., dissenting). Regulation of the professions is a matter within the competence of lawmakers, not federal courts. *Id.* at 802-803 (Constitution is "largely unconcerned" with substantive aspect of professional regulation). Because the HHS regulations are rationally related to the governmental interest in "protecting potential life," they in no way infringe upon a physician's constitutional rights. *See Akron*, 462 U.S. at 466 (O'Connor, J., dissenting).

The first amendment does not require the government to subsidize the spread of information which as a matter of public policy the government finds repugnant. *Regan v. Taxation with Representation*, 461 U.S. 540, 546 (1983). *Perry v. Sinderman*, 408 U.S. 593 (1972), cited by the court to support its holding that the regulations violate a physician's first amendment rights, is not to the contrary. Court's Opinion at 23. In *Perry*, a state supported employer refused to extend

the contract of its employee because the employee had exercised his first amendment rights outside the scope of his employment. Nothing in Title X prohibits recipients from saying about abortion whatever they desire outside of Title X services. *State of New York*, 889 F.2d at 412-13. Moreover, in *Perry*, the employer's purpose in suppressing the speech was *not* to avoid subsidizing the speech, but rather to punish the employee for political activity. *See FCC v. League of Woman Voters*, 468 U.S. 402, 408 (1984) (Rehnquist, J., dissenting).[3] Unlike this case, the state action in *Perry* was unrelated to any legitimate governmental objective. Through the HHS regulations, the government in this instance merely has chosen to encourage childbirth rather than abortion. That policy choice in no way contravenes the constitution.[4]

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3 In *League of Women Voters*, the Court by a five to four vote held unconstitutional a congressional ban on editorializing by noncommercial educational television and radio stations where federal funding constituted only 1% of the stations' overall income. In contrast, federal funds account for 50% of the monies received by Title X recipients. Court's Opinion at 12.

4 In *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947) and *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127 (1947), the Supreme Court rejected the notion that Section 12(a) of the Hatch Act was unconstitutional because of its interference with an employee's freedom of expression in political matters. In his dissent in *League of Women Voters*, Justice Rehnquist cogently noted:

> Section 12(a) of the Hatch Act totally prohibits any local or state employee who is employed in any activity which receives partial or total financing from the United States from taking part in any political activity. One might just as readily denounce such congressional action as prohibiting employees of a state or government receiving even a minor fraction of that government's income from federal assistance from exercising their First Amendment right to speak.

468 U.S. at 406 (Rehnquist, J., dissenting). Of course, political association constitutes the "core of those activities protected by the first amendment." *Elrod v. Burns*, 427 U.S. 347, 356 (1976). But the first amendment does not prohibit government from regulating the public political activity of those even partially dependent on its monetary benefits. How then, can the first amendment be read to prohibit a restriction on the dialogue between a physician and patient, when the physician and patient rely on federal funding to carry on such dialogue?

EXHIBIT B

Sixteen states and the District of Columbia have recognized a cause of action for wrongful birth arising from a woman's allegation that she was precluded from making an informed decision whether to have an abortion because her physician failed to adequately notify her while she was pregnant that her child could be born with birth defects.

Alabama:	*Robak v. United States*, 658 F.2d 471, 474-76 (7th Cir. 1981).
California:	*Turpin v. Sortini*, 31 Cal. 3d 220, 225, 237-38, 643 P.2d 954, 957, 965 (1982) (*en banc*).
Colorado:	*Lininger v. Eisenbaum*, 764 P.2d 1202, 1204-08 (Colo. 1988) (*en banc*).
District of Columbia:	*Haymon v. Wilkerson*, 535 A.2d 880, 882-86 (D.C. 1987).
Florida:	*Moores v. Lucas*, 405 So. 2d 1022, 1026-27 (Fla. 5th Dist. Ct. App. 1981).
Illinois:	*Siemienic v. Lutheran Gen. Hosp.*, 117 Ill. 2d 230, 253-60, 512 N.E.2d 691, 703-06 (1987).
Maine:	Me. Rev. Stat. Ann. tit. 24, § 2931(3) (1990).
Michigan:	*Proffitt v. Bartolo*, 162 Mich. App. 35, 41-47, 412 N.W.2d 232, 235-38 (1987), *appeal denied*, 430 Mich. 860 (1988).
New Hampshire:	*Smith v. Cote*, 128 N.H. 231, 237-42, 513 A.2d 341, 344-48 (1986).

New Jersey:	*Berman v. Allen*, 80 N.J. 421, 430-32, 404 A.2d 8, 13-14 (1979), *overruled on other grounds*, *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984).
New York:	*Becker v. Schwartz*, 46 N.Y.2d 401, 412-15, 386 N.E.2d 807, 813-14, 413 N.Y.S.2d 895, 901-03 (1978).
South Carolina:	*Phillips v. United States*, 508 F. Supp. 544, 548-51 (D.S.C. 1981).
Texas:	*Jacobs v. Theimer*, 519 S.W.2d 846, 848-50 (Tex. 1975).
Virginia:	*Naccash v. Burger*, 223 Va. 406, 411-15, 290 S.E.2d 825, 828-30 (1982).
Washington:	*Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 465-76, 656 P.2d 483, 487-93 (1983) (*en banc*).
West Virginia:	*James G. v. Caserta*, 332 S.E. 2d 872, 881-83 (W.Va. 1985).
Wisconsin:	*Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 773-75, 233 N.W.2d 372, 376-77 (1975).

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No. 89-1391 and No. 89-1392

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

DR. IRVING RUST, et al.
PETITIONERS
v.
LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

THE STATE OF NEW YORK, et al
PETITIONERS
v.
LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

ALAN ERNEST
COUNSEL FOR MOVANT

P.O. BOX 2963
RESTON, VA. 22090
(703) 437-1178

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MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

The Court is moved to allow Alan Ernest to represent the victims being killed by Roe v. Wade, 410 U.S. 113, as counsel or guardian ad litem, for the purpose of defending their right to life under the U.S. Constitution.

INTEREST OF COUNSEL

Alan Ernest is a lawyer in the District of Columbia and a member of the bar of this Court. His purpose is to prove that the guarantee of life to "any person," made in the U.S. Constitution, does include the unborn.

This is effectively a motion to allow retained counsel since there will be no expense to this Court, or to the taxpayers.

SUMMARY OF ARGUMENT

The unborn have a constitutional right to be especially represented by counsel to prove that their lives are specifically guaranteed by the U.S. Constitution.

Argument

THE UNBORN HAVE A CONSTITUTIONAL RIGHT TO BE ESPECIALLY REPRESENTED BY COUNSEL TO PROVE THEIR LIVES ARE PROTECTED BY THE U.S. CONSTITUTION.

1.

THIS COURT EFFECTED AND MAINTAINED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW COUNSEL TO REPRESENT THE UNBORN AND DEFEND THEIR RIGHT TO LIFE UNDER THE U.S. CONSTITUTION.

Counsel did not especially represent the unborn in the U.S. District Court, or at any stage in Roe v. Wade. An original party objected that the unborn should be represented by counsel in this Court:

> (T)he Court should have every benefit of a complete record and the representation of a guardian ad litem for that fetal entity and for its natural right to develop to birth.[1]

But this Court refused to allow counsel to represent the unborn and defend their right to life under the U.S. Constitution. Thus the killings commenced.

And the Supreme Court has maintained the killings by steadfastly refusing to

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1. Petition for Rehearing 5, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

allow counsel to represent the unborn, and defend their right to life under the U.S. Constitution.[2]

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2. The Court has refused to allow counsel for the unborn in all its abortion cases. Some are: Colautti v. Franklin, 439 U.S. 379, motion to allow counsel for the unborn denied 437 U.S. 902; Anders v. Floyd, 440 U.S. 445, motion to allow counsel for the unborn denied 439 U.S. 890; Bellotti v. Baird, 443 U.S. 622, motion to allow counsel for the unborn denied 439 U.S. 1065; Ashcroft v. Freiman, affirmed 440 U.S. 941, motion to allow counsel for the unborn denied, 440 U.S. 941; United States v. Zbaraz, 448 U.S. 358, motion to allow counsel for the unborn denied 444 U.S. 1030; Harris v. McRae, 448 U.S. 297, motion to allow counsel for the unborn denied 445 U.S. 941; H.L. v. Matheson, 450 U.S. 398, motion to allow counsel for the unborn denied 445 U.S. 959; Simopoulos v. Virginia, 462 U.S. 506, motion to allow counsel for the unborn denied 458 U.S. 1104; Planned Parenthood of Kansas City v. Ashcroft, 462 U.S. 476, motion to allow counsel for the unborn denied 458 U.S. 1104; Akron Center for Reproductive Health v. Akron, 462 U.S. 416, motion to allow counsel for the unborn denied 458 U.S. 1104; Diamond v. Charles, 90 L Ed 2d 48 (1986), motion to allow counsel for the unborn denied 87 L Ed 2d 704; Thornburgh v. American College of Obstetricians, 90 L Ed 2d 779 (1986), motion to allow counsel for the unborn denied 87 L Ed 2d 702; Hartigan v. Zbaraz, 98 L Ed 2d (1988), motion to allow counsel to for the unborn denied 93 L Ed 2d 697, and Webster v. Reproductive Health Services, ___ U.S. ___ (1989).

The unborn have a constitutional right to be represented by counsel in this case to defend their right to life under the U.S. Constitution.[3] Judges who willfully

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3. Even in civil proceedings, where crucial deprivations are threatened, such as loss of welfare, due process guarantees (1) prior notice of the factual and legal bases; (2) the right to be represented by counsel; (3) the right to confront and cross-examine adverse evidence; (4) the right to present evidence. Goldberg v. Kelly, 397 U.S. 254, 268-271 (1970). See also, In Re Gault, 387 U.S. 1 (1967).

Could it be possible that procedures, which could not be used to deprive a mother of welfare, could be used to exclude her from the protection of the U.S.Constitution so that she could be killed with impunity from criminal laws? This is preposterous.

The Constitution would not permit any court to condemn even one single Jew to death in a criminal case, but deny any of these procedural rights. Then neither can it permit any court to condemn all Jews in the United States to death, but deny any of these procedural rights, by calling it a civil proceeding, and decreeing the lives of all Jews are not protected by the U.S. Constitution, and it is "liberty" to kill all Jews with impunity from criminal laws.

Any victim is entitled to all these procedural protections before any court can decree that the victim's life is not protected by the Constitution, and the victim can be killed with impunity from criminal statutes. The rule for one is the rule for all; these are the sacred truth-seeking procedures which protect the lives of all Americans.

deny this right are guilty of crime.[4] This denial makes Roe v. Wade void.

2.

THIS COURT EFFECTED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW PRIOR NOTICE OF THE CONSTITUTIONAL STANDARDS, THE BURDENS OF PROOF, OR THE EVIDENCE WHICH IT USED TO INFER THAT THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION.

The District Court in Roe v. Wade did not even look to see if the lives of the unborn were protected by the Constitution. This question was argued for the first time after the case reached this Court. Since this Court had never previously excluded anyone from the protection of the U.S. Constitution so they could be killed with impunity from criminal statutes, the parties had no prior notice of the factual and legal bases for such an exclusion.

Moreover in the aftermath of Dred Scott v. Sanford, legitimate public

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4. "Even judges ... could be punished criminally for willful deprivations of constitutional rights." Imbler v. Pachtman, 424 U.S. 409 (1976).

expectation rested on the assurance that this Court would never again attempt another exception to the universal terms "any person."[5]

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5. This Court's decision in Dred Scott v. Sanford appears to be the only precedent in American history in which this Court has implied an exception to the universal terms "any person" in the Fifth or Fourteenth Amendments. The Court there ruled that the universal words "any person" did not include Negroes, there was a constitutional right to own a slave, and Congress could not prohibit slavery in the free territories. This decision triggered a civil war. Candidate Abraham Lincoln vowed he would not obey Dred Scott. Opponents said their states would withdraw from the Union rather than be deprived of their assumed constitutional right to own slaves and take them to the free territories. 4 Collected Works of Abraham Lincoln 267 (1953). But President Abraham Lincoln responded that if he were bound by Dred Scott, "the people will have ceased to be their own rulers." Id., at 268. Thus the war commenced.

A purpose of the Fourteenth Amendment was to overrule Dred Scott, and place it beyond the power of judges to ever again produce convulsions by implying an exception the universal words "any person." For over a century legitimate public expectation rested on the assurance that this Court would never again attempt an exception to the universal terms "any person."

But without any prior notice, this Court once again, in the precise manner of Dred Scott, attempted to imply an exception to the universal words "any person." In Roe v. Wade, this Court thus combined both total surprise and violent defiance of the long standing legitimate public expectation that never again would this Court violate the universal words "any person."

In particular, this Court gave the parties in Roe v. Wade no prior notice of the constitutional standards, the burdens of proof, or the evidence, which the Court used to infer that the universal words "any person," as used in the Fourteenth Amendment, did not include the unborn.

The first time the parties had notice was when Roe v. Wade was published, and the victims were already condemned to death. An original party objected that it lacked the prior notice needed to defend the unborn:

> (N)ot only did the Court set a new constitutional standard, but at the same moment the Court applied the standard without giving the Appellees notice or opportunity to present evidence with respect to the point in gestation at which such standards, if they be correct as a matter of law in the first place, should be applied. "Viability", "meaningful life" or existence, "fetal life": all presumably have medical meaning which should be subject to medical testimony before a decision of constitutional import becomes solidified in concrete. These concepts are not even necessarily the appropriate ones.[6]

But this Court refused to allow the original parties to have prior notice. Thus the killings commenced.

And this Court has maintained the killings despite repeated objections that the unborn had no prior notice in Roe v. Wade of the factual and legal basis needed to defend the unborn's right to life under the U.S. Constitution.[7]

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6. Petition for Rehearing 6, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973). (emphasis added).

7. See cases in note 2, supra.

The unborn have a constitutional right to prior notice of all the factual and legal bases before they can be excluded from the protection of the Constitution so they can be killed with impunity from criminal statutes.[8] Judges who willfully deny this right are guilty of crime.[9] This denial makes Roe v. Wade void.

3.

THIS COURT EFFECTED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY USING A SECRET EVIDENTIARY PROCESS TO FIND EVIDENCE TO INFER THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION.

This Court used some secret evidentiary process, not open to the parties, to find evidence to infer that the lives of the unborn were not protected by the U.S. Constitution. The Court conducted these evidentiary proceedings in its back rooms; the parties were not allowed to be present; no public record was made of these proceedings. The purpose of these

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8. See note 3, supra.

9. See note 4, supra.

proceedings was to find evidence to infer that the lives of the unborn were not protected by the U.S. Constitution. An original party objected to these secret judicial proceedings:

> The Court has taken judicial notice of innumerable facts and factors, some which are expressly referred to in the Court's decision and some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter-evidence since they form the foundation for the Court's opinion ... of constitutional stages of fetal growth.[10]

But the Court permitted the killings to commence despite this objection to its secret evidentiary proceedings.

And this Court has maintained the killings despite repeated objections that it used secret evidentiary proceeding in Roe v. Wade.[11]

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10. Petition for Rehearing 4, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

11. See cases in note 2, supra.

The unborn have a constitutional right not to be excluded from the protection of the U.S. Constitution by secret evidentiary proceedings.[12] Judges who willfully deny this right are guilty of crime.[13] This denial makes Roe v. Wade void.

4.

THIS COURT EFFECTED AND MAINTAINED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW ITS EVIDENCE, WHICH IT USED TO INFER THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION, TO BE CONFRONTED AND CROSS-EXAMINED.

Since the Court used a secret process, the original parties had not seen all the evidence which the Court used to infer that the lives of the unborn are not protected by the U.S. Constitution. An original party asked permission to cross-examine the evidence which the Court used to infer that the lives of the unborn were not protected by the U.S. Constitution:

> The Court has taken judicial notice of innumerable facts and factors, some

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12. See note 3, supra.

13. See note 4, supra.

> which are expressly referred to in the Court's decision and some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter-evidence since they form the foundation of the Court's opinion .... of constitutional stages of fetal growth.[14]

But the Supreme Court refused to allow the original parties to cross-examine its evidence in Roe v. Wade, which it used to infer that the lives of the unborn were not protected by the U.S. Constitution. Thus the killings commenced.

And this Court has maintained the killings by steadfastly refusing to allow its evidence, which it used to infer that the lives of the unborn were not protected by the U.S. Constitution, to be confronted and cross-examined.[15]

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14. Petition for Rehearing 4, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973) (emphasis added).

15. See cases in note 2, supra.

The unborn have a constitutional right to confront and cross-examine the evidence which this Court used to infer that their lives are not protected by the U.S. Constitution.[16] Judges who willfully deny this right are guilty of crime.[17] This denial makes Roe v. Wade void.

5.

THIS COURT EFFECTED AND MAINTAINED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW EVIDENCE TO BE PRESENTED ON BEHALF OF THE UNBORN TO ESTABLISH THEIR RIGHT TO LIFE UNDER THE U.S. CONSTITUTION.

In Roe v. Wade, the Court invented new constitutional standards on the protection of life by the U.S. Constitution, which the parties did not see until after Roe v. Wade was decided. The parties never had opportunity to present evidence under these new standards. An original party asked permission to present evidence under the new constitutional standards, which it had not seen before, to show that the lives of

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16. See note 3, supra.

17. See note 4, supra.

the unborn are protected by the U.S. Constitution:

> We are dealing here with a procedure long considered outlawed and which has suddenly become become legal.
> ....
> The Court has selected a point in time at which states may protect fetal life, without any record of facts upon which to base the conclusion that only at "viability," as that term is defined by the Court, do the people of a state have authority to demand caution before a prenatal infant is destroyed.
> ....
> Appellees have had no opportunity to show by evidence in a traditional judicial trial setting at what gestational stage the separate life of the fetus is "meaningful" medically; in addition, the Court overlooked the significance of Georgia's legal recognition of meaningful human life as found in case law and statute.
> ....
> With no opportunity for Appellees to demonstrate the factual basis, in terms of current medical science, that its interest attaches at a particular point in the natural development of a human fetus, the Court has seized upon the convenient point of "viability" and crystallized constitutional command which bars State action.
> ....
> In the medical concept of "life," with its current body of technological knowledge, including such advances as fetal electrocardiography and fetal electroencephalography, legal "life" should not be cemented at an event in

> a judicial conclusion which does not have the benefit of medical evidence.
> ....
> At any rate, Appellees should have an opportunity to present evidence and testimony to support the State's claim of medically and scientifically sound interest in requiring a cautious approach to the extinguishment of fetal life.18

But the Court refused to allow the original parties to present evidence to show that the lives of the unborn were protected by the U.S. Constitution. Thus the killings commenced.

And this Court has maintained the killings by steadfastly refusing to allow evidence to be presented on behalf of the unborn to prove that their lives are protected by the U.S. Constitution.19

The unborn have a constitutional right to present evidence in this case to prove that their lives are protected by the U.S.

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18. Petition for Rehearing 3,4,5,6,8, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

19. See cases in note 2, supra.

Constitution.[20] Judges who willfully deny this right are guilty of crime.[21] This denial makes Roe v. Wade void.

The procedures used by the Court to effect and maintain the Roe v. Wade killings are essentially the same procedures cited by the Nuremberg Court as part of the evidence to convict the Nazi judges of complicity in extermination and murder.[22]

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20. See note 3, supra.

21. See note 4, supra.

22. "In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them.... They were ... denied the right of counsel of their own choice....(T)he accused learned only a few moments before trial of the nature of the alleged crime for which he was to be tried. The entire proceedings from beginning to end were secret and no public record was allowed to be made of them." United States v. Altstoetter, 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1046-1047 (1951). "Such a mock trial is not a judicial proceeding but a murder." Id., at 1164. "The dagger of the assassin was concealed beneath the robe of the jurist." Id. at 985.

II.
ISSUES RAISED BY COUNSEL NOT RAISED BY THE PARTIES

1. THE UNIVERSAL GUARANTEE OF LIFE TO "ANY PERSON," MADE BY THE U.S. CONSTITUTION, DOES INCLUDE THE UNBORN.

The parties have not raised the question of whether the lives of the unborn are protected by the U.S. Constitution, which disposes of all issues in this case.

The unborn have a right to assistance of counsel, to present evidence and arguments not presented by the parties, to show that the universal guarantee of life to "any person," made in the U.S. Constitution, does include the unborn.[23]

2. THERE IS A GOVERNMENT CONSPIRACY TO IMPOSE ON THIS NATION THE EXACT DOCTRINES WHICH THE UNITED STATES ITSELF CONDEMNED AS MURDER AT NUREMBERG.

At Nuremberg the Nazi judges claimed they could not be held accountable for the murder of millions of Jews, because "the

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23. This evidence and arguments are presented in the amicus curiae brief by the Legal Defense For Unborn Children and incorporated herein by reference.

supreme judge" of Nazi Germany had decreed those killings to be legal.[24] Under Nazi law, which they had obeyed, those killings were legal. But the United States prosecuted and the Nuremberg court convicted the Nazi judges of participating in a government conspiracy to murder.

Yet the record proves that the U.S. Supreme Court conspires to impose those exact doctrines on America by decree. This Court decreed killings to be "liberty" which the people had defined by their homicide statutes to be "murder."[25] This Court exactly decreed mass murder to be legal. By merely changing the names of the victims, this Court has duplicated the decree of "the supreme judge" of Nazi Germany.

When the U.S. Supreme Court was accused of mass murder in the United States District

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24. United States v. Altstoetter, supra, at 983-985, 1011-1014.

25. See amicus brief by Legal Defense for Unborn Children, filed herein, pages 10-22.

Court in Richmond, the U.S. Government claimed that the Supreme Court had the power to decree mass murder to be legal, and the U.S. Government expressly argued that the Supreme Court must be obeyed even if it decreed a liberty to kill Jews.[26] Although the U.S. District Judge objected that Roe v.

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26. Ernest v. United States Attorney for the Eastern District of Virginia, transcript of proceedings at 21-22, cert. denied 475 U.S. 1084 (1986):

> [U.S. District Judge]: Let me ask you to respond to this question. The plaintiff argues in his brief that the Supreme Court in Roe v. Wade took a discrete group of entities and said that these entities have no right to live, and thus may be killed .... And he said if you take Roe v. Wade and remove the word "fetus" and just substitute most any other word you want of another discrete group, that we wouldn't be here discussing this at all. Let's say that instead of "fetus," they said "Jews." That is the one he used in his brief.
>
> Would you argue stare decisis to me if, under Roe v. Wade, at the whim of neighbors Jews could be put to death?
>
> [U.S. Govt. Lawyer]: (I) would have to agree with the doctrine of stare decisis and advance it to the court.

Wade was "the worst decision by the Supreme Court in the history of the Court," the U.S. District Judge adopted the U.S. Government's arguments that he must obey the U.S. Supreme Court no matter who it decreed a liberty to kill.[27] This record proves a conspiracy by both the executive and judicial departments of the government of the United States to impose on this nation the very doctrines which the United States itself condemned as murder at Nuremberg. Yet on review, not one Justice of this Court had any objection to these doctrines.[28]

Moreover, each Justice of this Court was named as a defendant in a civil suit, and accused of mass murder in the U.S.

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27. Ernest v. United States Attorney for the Eastern District of Virginia, pet. cert. at A2, cert. denied 475 U.S. 1084 (1986).

28. Ernest v. United States Attorney for the Eastern District of Virginia, cert. denied without comment 475 U.S. 1084 (1986). If any Justice had believed that the doctrines condemned as murder at Nuremberg were not legal in the United States, as claimed by the U.S. Government, he certainly would have noted his objection.

District Court in Alexandria.[29] The Justices boldly claimed, through their U.S. Government lawyers, that the U.S. Supreme Court has the power to decree mass murder to be liberty. The Justices further claimed that after the Supreme Court had decreed (without any trial) mass murder of anyone to be liberty, the victims being killed could not even appear in court and challenge the validity of the decree. And the U.S. District Judge adopted this position as law without even permitting a hearing in the cause, or even being able to show one single allegation in the complaint to be wrong in fact or law. Thus, each Justice of this Court boldly claimed the absolute power to decree mass murder to be liberty, by mere decree without trial, no matter who the victims might be, and this is now accepted by all the courts of the United States, the

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29. Ernest v. Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy, et al, civil No. 89-732-A.

U.S. Congress, and the President, as the law of the land.

Moreover this has been the steadfast policy of the United States, asserted in court after court, for almost two decades. All the lower judges who have upheld this Court's claim of power to condemn millions to death by decree, are accused of complicity in capital mass murder.[30]

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30. U.S. DISTRICT JUDGES: Albert V. Bryan, Jr.; Emmett R. Cox; Edward T. Gignoux; Harold H. Greene; J. Thomas Greene; William B. Hand; Joseph C. Howard; Martin F. Loughlin; Robert Earl Maxwell; Louis F. Oberdorfer; Raymond J. Pettine; Aubrey E. Robinson, Jr.; John J. Sirica; James R. Spencer; James C. Turk; D. Dortch Warriner; Don J. Young. U.S. CIRCUIT JUDGES: D.C. Circuit- David L. Bazelon; Carl McGowan; Roger Robb; George E. MacKinnon; Spotswood Robinson III; J. Skelly Wright; Edward A. Tamm; Malcolm R. Wilkey. First Circuit- Levin H. Campbell; Frank M. Coffin; Hugh H. Bownes; Stephen G. Breyer. Fourth Circuit- Harrison L. Winter; Donald S. Russell; H. Emory Widener, Jr.; Kenneth K. Hall; James D. Phillips, Jr.; Francis D. Murnaghan, Jr.; James M. Sprouse; Sam J. Ervin, II; Robert F. Chapman. Eleventh Circuit- John C. Godbold; Paul H. Roney; Gerald B. Tjoflat; James C. Hill; Peter T. Fay; Robert S. Vance; Phyllis A. Kravitch; Frank M. Johnson, Jr.; Albert J. Henderson, Jr.; Joseph W. Hatchett; R. Lanier Anderson, III; Thomas A. Clark. AND the judges in Roe v. Wade and Doe v. Bolton who decreed a

The U.S. Congress has also joined the conspiracy to impose these doctrines on the United States. When the Congress held hearings on Roe v. Wade, it conspired to allow all the false evidence in Roe v. Wade to be presented, but refused to allow the rebuttal to be presented, and thus Congress conspired to present falsehood to the nation as if it were the truth. Moreover Congress has deliberately defied its constitutional duty to control this Court, knowing full well that its defiance would directly contribute to the death of the victims. Thus leaders of Congress have joined the federal judicial and executive departments in this gigantic conspiracy.[31]

"liberty" to kill the unborn without any investigation to see if their lives were protected by the Constitution: Circuit Judges Morgan and Goldberg; District Judges Smith, Henderson, Hughes and Taylor.

31. The complaint (supra note 29) at para. 6 p.3, alleged that various members of the committees on the Judiciary, whose particular duty was to control the courts, were a part of the conspiracy: "The co-conspirators include ex-Chairman Peter Rodino, Chairman Rep. Jack Brooks,

The leaders of all three branches of the government of the United States escape the accusation that they conspired to commit capital mass murder - to kill children in violation of murder statutes - by merely claiming the same defense, using the very same words, which the United States itself condemned as murder at Nuremberg. This is surely the signal event in the history of mankind's search for a government of laws, and not of men.

This is a conspiracy by leaders of the judicial, executive and legislative branches of the government of the United States: (1) to claim the absolute power to decree mass murder to be legal, (2) to claim that if the Supreme Court decreed the killing of Jews (or any victims whatever) to be legal, the whole nation must obey, and (3) to supplant

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subcommittee chairman Rep. Don Edwards, subcommittee chairman Rep. Robert Kastenmeier; Chairman Sen. Joseph Biden, ex-Chairman Sen. Edward Kennedy. A jury could find this conspiracy to be murder."

the U.S. Constitution as the supreme law of the land, and to impose the legal system on the United States by judicial fiat, which was adjudged to be murder at Nuremberg.

Leaders of the national news media have also joined the conspiracy. Even though the U.S. Supreme Court was accused of mass murder in The Washington Post,[32] and the Court never attempted to prove a word of the accusation to be wrong, that newspaper continued its policy of editorially supporting the killings despite repeated notices its encouragement could amount to complicity in mass murder.[33]

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32. "WASHINGTON LAWYER CHARGES U.S. SUPREME COURT WITH MASS MURDER," published in The Washington Post, Sept 12, 1979, page A6.

33. The Washington Post has been warned almost 100 times that advocacy of murder is not free speech; that even a sincere belief that Roe v. Wade is good law is no defense, since ignorance of the law is no excuse, and the narrow exception of reasonable reliance on a court decision does not apply in homicide cases. See authorities in amicus brief (supra note 25) at p.62 n.6. And while The Washington Post supported the killings, it covered up news unparalleled in world history - that the U.S. Government claimed the power to decree a liberty to kill Jews, or anyone - by mere decree without trial.

In explaining how the monstrous crimes of the Nazi regime went unchecked, Winston Churchill merely quoted Machiavelli: "Men avenge slight injuries, but not grave ones." In this manner America is ruled by a giant conspiracy to commit mass murder, which consists of leaders of all three branches of the federal government, and leaders of the national news media. That the United States can be ruled for two decades by a giant conspiracy to mass murder is the most catastrophic crime in the recorded history of the world, which now draws a terrifying darkness over the future of all mankind.

CONCLUSION

The Court is moved to allow counsel to represent the unborn and defend their right to life under the U.S. Constitution.

Alan Ernest, Counsel

MOTION FILED
JUN 8 1990

No. 89-1391 and No. 89-1392

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

DR. IRVING RUST, et al.
PETITIONERS
v.
LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

THE STATE OF NEW YORK, et al
PETITIONERS
v.
LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE WITH BRIEF BY LEGAL DEFENSE FOR UNBORN CHILDREN

ALAN ERNEST
COUNSEL FOR AMICUS

P.O. BOX 2963
RESTON, VA. 22090
(703) 437-1178

MOTION FOR LEAVE TO FILE

Interest of Amicus

The brief, which does not support any party, defends the constitutional right to life of the unborn, which the parties have not done.

Argument

The amicus proves that the the Fifth and Fourteenth Amendments' guarantee of life to "any person" does include the unborn. Thus this Court must not only overrule Roe v. Wade, 410 U.S. 113, it must rule that the States have a duty to protect unborn life. The parties have not raised this issue; it disposes of all issues in this case.

The universal guarantee of life to "any person" is the most important right in the Constitution, and the lives of millions of children depend on their being permitted to present all relevant evidence to prove their unalienable right to life.

Alan Ernest, Counsel

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Argument

I.

THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

1. THE LETTER OF THE LAW (THE GUARANTEE OF LIFE TO "ANY PERSON," THE TWO MOST IMPORTANT WORDS EVER ENACTED INTO LAW) ON ITS FACE INCLUDES THE UNBORN.....1

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Interest of Amicus

The amicus defends the right to life of the unborn, which the parties have not done.

Summary of Argument

The unalienable guarantee of life to "any person," made in the Fifth and Fourteenth Amendments, includes the unborn.

Argument

I.

THE GUARANTEE OF LIFE TO "ANY PERSON," MADE BY THE CONSTITUTION, INCLUDES THE UNBORN.

1. THE LETTER OF THE LAW (THE GUARANTEE OF LIFE TO "ANY PERSON," THE TWO MOST IMPORTANT WORDS EVER ENACTED INTO LAW) ON ITS FACE INCLUDES THE UNBORN.

The 5th and 14th Amendments guarantee that not "any person" can be deprived of "life ... without due process of law." The words "any person" are universal, admit of no exceptions for anyone, make no distinction between born and unborn life, and thus on their face include the unborn, the same as everyone else. The obvious purpose of guaranteeing life universally to "any person" was to forbid making exceptions so some persons could be exterminated.

The Court admitted that if the word "person" included the unborn, then Roe v. Wade "collapses," because the unborn's lives would be "guaranteed" by the Constitution.[1] In ruling "the word 'person' ... does not include the unborn,"[2] the Court hit the Constitution head on, did what is expressly forbidden, and directly defied the letter of the law of its most important guarantee.

The words "any person" are the two most important words ever written into law. The guarantee of life to "any person" is the single most important guarantee because it protects the lives of everybody from government sanctioned extermination, as happened in Nazi Germany.

And the words "any person" give legal body to the spirit that "all men are created equal" and endowed with an "unalienable" right to life. The words "any person" exactly summarize what America stands for,

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1. Roe v. Wade, 410 U.S. at 156-157.
2. Roe v. Wade, 410 U.S. at 158.

its unique contribution to civilization. As Abraham Lincoln said, what made America great was the promise "not alone to the people of this country, but hope to the world for all future time ... that ALL should have an equal chance."

The words "any person" are the very words which guarantee that equal chance to "ALL"; they stand as the supreme political achievement of the human race, the prize of milleniums of struggle. If the Constitution had stated it protected the life of "any person - except the unborn," then its words would support Roe v. Wade. But its words say "any person," without any exceptions at all.

The Supreme Court of West Germany held that the words, "Everybody has the right to life," did include the unborn; it explained that the word "everybody" is universal.[3]

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3. R. Destro, Abortion and the Constitution The Need For A Life Protective Amendment, 63 Cal. L. Rev. at 1341-51 (1975). In 1975 the Supreme Court of West Germany ruled that the phrase in its Constitution, "Everybody has the right to life," did include the unborn, that "Abortion is an act of homicide," and

The Constitution extends its guarantee of life to "any person." The letter of the law permits no exceptions; on their face the words "any person" do include the unborn.

2. THE MODIFIER "ANY" INVOKES A VIRTUALLY IRREBUTTABLE PRESUMPTION THAT THE GUARANTEE OF LIFE TO "ANY PERSON" INCLUDES THE UNBORN.

The Court never studied the letter of the law - the universal words "any person." Instead the Court focused on the isolated word "person," and ignored its modifier "any," which invokes a virtually irrebuttable presumption in favor of life that the words "any person" do include the unborn.[4]

By reading the guarantee of life to "any person" as if it merely said "some persons," the Court did the most forbidden

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the state had a "duty ... to protect unborn life." It noted "Everybody" is universal:

> The right to live is guaranteed to everybody who is "alive." No distinction can be made among the several stages of developing life before birth, or between prenatal or postnatal life. "Everybody" ... means every "living person,"... therefore, "everybody" in this sense also includes unborn human beings.

4. See burden of proof, infra p. 39.

thing and reduced to nothing what is deemed the most important law in the history of political institutions.

3. THE SPIRIT OF THE LAW, THAT "ALL MEN ARE CREATED EQUAL," SHOWS THE GUARANTEE OF LIFE TO "ANY PERSON" INCLUDES THE UNBORN.

Roe v. Wade violates the spirit of the law, as well as its letter. The promise that "all men are created equal" and endowed with an "unalienable" right to "life" is the guiding spirit of American law. The Supreme Court itself ruled it is the spirit of the Fourteenth Amendment:

> "The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life...' While such declaration of principles may not have the force of organic law ... yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than ... to secure the equality of rights which is the foundation of free government." Gulf, Colo. & S. Fe Ry v. Ellis, 165 U.S. at 159-160 (1896).

There is no real medical dispute that the unborn have been created.[5] Reading the letter of the Constitution, the guarantee of life to "any person," in the spirit that "all" are "created equal," and "all" shall get their equal chance to live, proves that the words "any person" do include the unborn. Concerning the right to life, the unborn are the equal of anyone.

4. HISTORY SHOWS THE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

The last time this Court attempted to imply an exception to the words "any person" was Dred Scott v. Sandford, 19 How. 393 (1857). The 13th and 14th Amendments were intended to overrule this decision that the words "any person," as used in the 5th Amendment, did not include Negroes; there was a constitutional right to own a slave; the phase "all men are created equal" did

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5. The uncontradicted medical evidence in the Texas brief in Roe v. Wade showed the fetal heart begins "pulsations at 24 days"; and "brain waves have been noted at 43 days"; and the unborn child is "alive."

not include Negroes; Congress could not prohibit slavery in the territories; and Negroes could not sue in federal court to see if they were slave or free.

Abraham Lincoln was a leading opponent of Dred Scott. If officials can say all men are created equal except Negroes, he asked, "where will it stop?" He denounced Dred Scott as based on "falsehood," and he alleged a conspiracy by the U.S. Supreme Court, two Presidents, and leading members of Congress, to make slavery legal everywhere and overturn the foundation of our government. Explaining why he would not obey it, President Lincoln said that Dred Scott resulted in "the rule of minority, as a permanent arrangement" which was "wholly inadmissible" and if the President were bound by Dred Scott, "the people will have ceased, to be their own rulers."

Dred Scott triggered a civil war, and President Lincoln defied the Court's decision, that there was a constitutional

right to own a slave, when he emancipated slaves and declared them to be "forever free." He reminded us at Gettysburg that we were fighting to see whether a nation dedicated to the principle that "all men are created equal" could "long endure."

The Fourteenth Amendment was intended to rededicate this nation to this original proposition. One of its framers explained:

> "It establishes equality before the law, and it gives to the humblest ... the most despised ... the same protection before the law as it gives to the most powerful.... Without this ... there is no republican government." Rep. Jacob Howard, quoted in 1 B. Schwartz, Statutory History of the United States: Civil Rights 262 (1970).

The framers intended to prevent another Dred Scott catastrophe of judges ever again implying exceptions to the words "any person" to exclude anyone; they employed the universal words most suited for this purpose. And the people had already enacted criminal abortion laws to protect all stages of unborn life, showing the guarantee of life to "any person" means what it says.

Roe v. Wade is simply another Dred Scott disaster which rests on historical contradictions so insane that to permit it is to confess that men cannot be governed by truth, reason, or laws.[6] The Court did the most forbidden thing, and defied the "unalienable" guarantee of life to "any person," the two most important words ever written into law.

The letter of the law, its spirit, its history, its presumption in favor of life, the medical facts known to the 19th century, as well as the 20th, unite to permit only one lawful conclusion: the guarantee of life to "any person" does include the unborn.

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6. Roe v. Wade rests on the contradiction that without one word of explanation, the framers intended their very promise of life to all, to "any person," to sweep away all their abortion statutes, and make killings, which they had already condemned as criminal, a fundamental "liberty" ranked along with free speech. Roe v. Wade further pretends that the framers somehow silently connived to repudiate a major point of the civil war, so that, in the manner of Dred Scott, judges would be at liberty to again produce more convulsions by implying more exceptions to the words "any person."

II.

ROE v. WADE IS VOID BECAUSE IT CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" AND CONDEMNED TO DEATH MILLIONS OF VICTIMS WHOM THE CONSTITUTION ENDEAVORS TO PRESERVE.

1.

ROE v. WADE CRIMINALLY DEFIED THE GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT DECREED KILLINGS TO BE "LIBERTY" WHICH THE PEOPLE HAD DEFINED TO BE "MURDER." THE COURT DECREED "MASS MURDER IS LIBERTY."

When the Fourteenth Amendment was adopted in 1868, an abortion was murder if the child was "born alive." And a child could be "born alive" long before the Court's arbitrary point of "viability."[1]

An 1859 study by the American Medical Association stated the law of murder throughout the United States:

> If a person, intending to procure abortion, does an act which causes the

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1. This Court arbitrarily set the point, where the law could begin to protect the unborn, at "viability" (about 7 months gestation) "because the fetus then presumably has the capability of meaningful life outside the ... womb." Roe v. Wade, supra, 163. The point is arbitrary, because the Court cannot explain why (in legal and medical precedent) it can be criminal to kill the unborn a few days after viability, but must be "liberty" to kill the unborn a few days before. The Court invented it.

> child to be born earlier than its natural time, and therefore in a state much less capable of living, and it afterwards die in consequence of such premature exposure, the person who by this misconduct brings the child into the world, and puts it into a situation in which it cannot live, is guilty of murder.[2]

Yet in 1973, without any investigation of the law of murder, the Court decreed this very killing to be "liberty" which the American people had universally defined to be "murder." In plainest terms, the Supreme Court decreed: "MASS MURDER IS LIBERTY."

A. THE ENGLISH COMMON LAW WAS THE LAW OF THE LAND IN COLONIAL AMERICA

America's first settlement at Jamestown followed the English common law, as did other colonies. The common law defined an abortion in which a "quick" (about 4 months gestation) child died after being "born alive" to be "murder."[3] So if

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2. Reported in A.S. Taylor, A Manual of Medical Jurisprudence 462 (6th ed. 1866). He described the AMA report as "a complete and comprehensive exhibit of laws of each of the United States." Id., at 460.

3. Coke, 3 Inst. 50; Hawkins, 1 Hawkins Ch. 13, s. 16; Blackstone, 4 Bl. Com. 198.

the child were "born alive" (even if not "viable"), Coke said the abortion is "so horrible an offense" and "this is murder."[4]

Regina v. West involved this very abortion of a quick, but pre-viable child:

> "The prisoner is charged with murder; and the means stated are, that the prisoner caused the premature delivery ... by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died.
> ....
> "A medical witness stated ... that it was a healthy child; but that, being born at that period of gestation, it was impossible that it could live any considerable length of time separated from the womb of the mother. It was incapable of maintaining a separate and independent existence." Regina v. West, 2 C & K 784, 786-788 (1848).

Although not yet viable, the judge cited Coke and instructed the jury that if the child were "born alive," the abortion was

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4. Coke, 3 Inst. 50. "This work is executed with so much learning and judgment, that I do not recollect that a single position in it has ever been judicially denied....(I)t may still be considered as the fundamental code of the English law." 14 The Writings of Thomas Jefferson 57 (Bergh ed. 1907). Jefferson was an authority on colonial law, serving on the 1776 committee which adapted Virginia's laws to republican form, the common law being assigned to him.

murder.[6] The English writers cited this as the correct statement of the law.[7]

Thus Roe v. Wade decreed killings to be "liberty" which had been condemned as "murder" since earliest colonial times.

B. "BORN ALIVE" ABORTIONS WERE MURDER WHEN THE FOURTEENTH AMENDMENT WAS ADOPTED.

The English common law is the dictionary which courts use to construe the state and federal homicide statutes.[8]

By the time the Fourteenth Amendment was adopted, American legal authorities had

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6. Regina v. West, 2 C & K at 788: "I am of opinion (and I direct you in point of law), that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder."

7. 1 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783 (Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-672 (4th ed. 1865).

8. Clarke v. State, 117 Ala. 1 (1898); Hamilton v. United States, 26 App. D.C. 382 (1905).

long followed the common law rule that abortions of pre-viable children "born alive" were murder. In 1858 the preeminent legal writer of the 19th century explained:

> "If a person intending to procure abortion, does an act which causes a [quick] child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies, in consequence of its exposure to the external world, the person who by this misconduct, so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder" F. Wharton, A Treatise on the Law of Homicide in the United States 93 (1855).

This was the uncontradicted view in the United States when the Fourteenth Amendment was adopted.[9] Courts applied this law of murder.[10] It was still the law in 1973.[11] In 1975 the New Jersey courts

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9. 2 J.P. Bishop, Commentaries on the Criminal Law 365 (4th ed. 1868); A.S. Taylor, supra, 462, 517.

10. Clarke v. State, 117 Ala. 1 (1898). "In Georgia ... the wilful killing of an unborn child so far developed as to be ... called 'quick,' is considered as murder." Porter v. Lassiter, 87 S.E. 2d 100, 102 (1955).

11. R. Perkins, Criminal Law 30 n.17 (2d ed 1969).

applied this 17th century murder law to the killing of a pre-viable fetus born alive:

> That a fetus may be the victim of murder if it be born alive has long been a part of our common law....Coke, Institutes 58 (1648).[12]

For almost four centuries governments came and went, but the law that born alive abortions are murder, which is binding on the U.S. Supreme Court,[13] remained the law of the land.

Thus Roe v. Wade decreed killings to be "liberty" which had been universally condemned by the framers and adopters of the Fourteenth Amendment to be "murder."

C. THE GUARANTEE OF LIFE TO "ANY PERSON" INCLUDES CHILDREN GUARDED BY THE MURDER LAW

The guarantee of life to "any person" in the Fourteenth Amendment must include

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12. State v. Anderson, 343 A. 2d 505, 508 (1975), affirmed 413 A. 2d 611 (1980). The courts rejected the claim it was not murder because "the infants were never capable of maintaining a separate and independent existence." Id. at 615.

13. Chief Justice Marshall ruled that the Supreme Court must accept the construction given by a state to its own statute. Pollard v. Dwight, 4 Cranch 421, 429.

all persons whose lives were protected by the law of murder when the Amendment was adopted. No dispute is even possible.

If the killing of Jews had been defined to be murder in 1868, it is certain that the framers did not intend to exclude Jews from the guarantee of life to "any person" so it would be "liberty" to kill Jews with impunity from criminal laws. Changing the names of the victims does not change the legal result.

The people who framed and adopted the Amendment had condemned the taking of a crying, pre-viable infant from its mother's womb to be murder. Thus it is certain that they did not intend to exclude the lives of these children from the guarantee of life to "any person" so it would be "liberty" to kill them with impunity from murder laws.

By arbitrarily setting "viability" as the point the law could begin to protect unborn life, the Court decreed the same

killing to be "liberty" which the American people had condemned as "murder."

The words "any person" do indisputably include children protected by the law of murder. And since personhood under the Constitution does not just fade away with time, like some magic disappearing ink, the right to life of these children is still guaranteed by the Fourteenth Amendment.

D. ROE_v._WADE_ALLOWS_HYSTEROTOMY_ABORTIONS

Roe v. Wade hysterotomy abortions, basically Caesareans, result in children "born alive."[14] As explained to Congress:

> With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry.... Almost all were born alive.[15]

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14. Jeffries and Edmonds, Abortion: The Dreaded Complication, Philadelphia Inquirer, August 2, 1981.

15. Hearings on Constitutional Amendments on Abortion, before subcomm. on Civil and Constitutional Rights, of the House Comm. of the Judiciary, 94th Cong., 2d Sess., Ser. 46, Part 1, at 397 (1976) (statement by Dr. John Willke, M.D.). There are about 140,000 second stage abortions each year. Washington Post, April 26, 1985, All. Most methods can result in a child born alive.

When the Fourteenth Amendment was adopted, these hysterotomy abortions were murder. Thus the lives of the children are still guaranteed by the Amendment, and the killings are still murder.

F. THE DECREE "MASS MURDER IS LIBERTY" OVERTHROWS THE U.S. CONSTITUTION

Is a government of laws founded upon evidence, or the mere naked decrees of men holding office for life? The evidence proves that the lives of these children are guaranteed by the U.S. Constitution.

This evidence for the unborn is exactly the same evidence which many people must rely upon to prove their lives are guaranteed by the U.S. Constitution.[16] If

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16. Suppose it were claimed in federal court that it is "liberty" to kill the insane, or invalids, or Jews. What factual, non-argumentative evidence could be found to establish their right to life under the U.S. Constitution?

As with the unborn, it would do no good to object that no one ever heard of a "liberty" to kill them - or to object that such killings had thereto been criminal.

The Amendment merely states that it protects the life of "any person." So, as with the unborn, it does not expressly

the evidence is ineffective for the unborn, then the Roe v. Wade precedent can grow to a "liberty" to kill virtually anyone. If the Supreme Court decreed it "liberty" to kill Jews, this same evidence would prove it "murder," and not "liberty." Judges may have more sympathy for other victims, but changing the names of the victims will not change the legal result.

Roe v. Wade murders reason itself. In his novel, "1984," Orwell described how a tyranny defrauded its subjects into obedience with the "doublethink" slogan "FREEDOM IS SLAVERY." Although this science fiction appears improbable, the U.S. Supreme Court has defrauded the United

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refer to them; and its legislative history does not appear to expressly refer to them.

The principle that all people are "created" equal, with an "unalienable" right to "life," having been sneered out of court in Roe v. Wade, now provides no assurance for anyone.

As with the unborn, the murder laws don't expressly refer to the insane, or invalids, or Jews; the intention of the legislators is found in the common law.

If the evidence cannot protect the unborn, the lives of many are imperiled.

States into obedience with the ultimate falsehood: "MASS MURDER IS LIBERTY."

Abraham Lincoln ridiculed Dred Scott by reducing it to its plainest terms:

> [We hold these truth to be self-evident, that] all men are created equal - except Negroes. That if any one man, choose to enslave another, no third man shall be allowed to object.

The Fourteenth Amendment intended to prevent this forever. Yet Roe v. Wade, reduced to its plainest terms, asserts:

> We hold these truths to be self-evident, that all men are created equal - except those created to be murdered. That if any one man, choose to murder another, no third man shall be allowed to object.

By changing the names of the victims, the Supreme Court has duplicated the decree of "the supreme judge" of Nazi Germany who asserted the killing of Jews to be legal.[17]

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17. United States v. Altstoetter, 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1011-1014 (1951). The Nazi judges claimed that they could not be held accountable for complicity in extermination and murder, since they had acted "within the authority" of the "decrees" of "the supreme judge." Id. at

The key doctrines of the Nazi judiciary have been adopted by the courts of the United States: a "supreme judge" which decrees mass murder to be legal; and lower judges who rule they must blindly obey.[18]

The Court did exactly what the guarantee of life to "any person" was intended to prevent, and decreed murder to be legal, by giving "murder" the new name "liberty." But Chief Justice Marshall condemned such sham:

> "Is the proposition to be maintained that the Constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief which is expressly forbidden by words most appropriate for its description; may be performed by the substitution of a name? That the Constitution, in one of its most important provisions, may be evaded by giving a new name to an old

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983-85. Their "supreme judge" had decreed killings to be legal which had been defined by statute to be criminal. But the tribunal held, "The dagger of the assassin was concealed beneath the robe of the jurist."

18. Ernest v. U.S. Attorney etc., cert. denied 475 U.S. 1084 (1986). The U.S. District Judge ruled that Roe v. Wade was "the worst decision by the Supreme Court in the history of the Court." But he stated that even if the Supreme Court decreed it liberty to kill Jews, he must obey and permit the killings to continue.

thing? We cannot think so." Craig v. Missouri, 3 Pet. at 433 (1830).

Thus the United States is ruled by the decree "MASS MURDER IS LIBERTY." But murder is still murder, no matter what new name the Court gives it. This is the most catastrophic crime in history. This precedent of judicial alchemy to convert murder into "liberty" can be evoked at whim to kill anyone; it cancels the "unalienable" guarantee of life and makes everybody a mere hostage of this Court; it is a virtual murder gun held to everyone's head - all life now depends merely on judicial whim; it defies the consent of the governed; it smashes the hopes of the whole human race for government by truth and laws, and reduces government to the mere matter of which murderer can grab power and be obeyed. Again people must struggle to ensure that the nation dedicated to the proposition that "all men are created equal" shall not "perish from this earth."

2.

ROE v. WADE CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT FABRICATED EVIDENCE TO FALSELY IMPLY THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN.

The 19th century abortion statutes supplanted the medieval view that unborn life began at "quickening"[1] and expanded protection of law to all stages of unborn life; they prove the guarantee of life to "any person" includes the unborn, that no distinction can be made among the stages of unborn life.

When the Fourteenth Amendment was adopted in 1868, over three-fourths of the ratifying states had already made abortion at any stage of gestation a crime.[2] Within a few years, these statutes were universal.

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1. "Life is the immediate gift of God, a right inherent by nature in every individual: and it begins in contemplation of law as soon as the infant is able to stir in the mother's womb." 1 Bl. Com. 126.

2. The statutes are set out in Quay, Justifiable Abortion, Medical and Legal Foundations, 49 Geo. L. J. 447-520 (1961).

And in those few States still following the common law, judicial revision makes it impossible for this Court to assert with any assurance that it was any different than the prevailing statutes:

> By the ancient common law ... as the life of an infant was not supposed to begin until it stirred in the mother's womb, it was not regarded as a criminal offense to commit an abortion in the early stages of pregnancy. A considerable change in the law has taken place in many jurisdictions by the silent and steady progress of judicial opinion; and it has been frequently held by Courts of high character that abortion is a crime at common law without regard to the stage of gestation.[3]

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3. Lamb v. State, 67 Md. 524 (1887). Some state supreme courts rejected medieval medical views and ruled that the common law made abortion at any stage of gestation a crime. Mills v. Comm., 13 Pa. 631 (1850); State v. Slagle, 83 N.C. 544 (1880); State v. Reed, 45 Ark. 333 (1885).

Wharton, a standard 19th century text, stated that under common law "the protection of the law was cast round an unborn child from its first stage of ascertainable existence, no matter whether 'quickening' had taken place or not." F. Wharton and M. Stille, Treatise on Medical Jurisprudence 927-28 (2d ed. 1860).

And those state supreme courts which ruled that abortion prior to quickening was not a common law crime were immediately

The theory of a "liberty" to kill the unborn faced a fatal contradiction. How could the Court dare to Dred Scott-like imply an exception to the guarantee of life to "any person" in order to declare killings to be "liberty" which the people had defined to be criminal? This absurd contradiction wrecks Roe v Wade.

To resolve this fatal contradiction the Court fabricated the hypothesis that the 19th century criminal abortion statutes were not intended to protect unborn life, but were only intended to protect the mother. This falsely implied that the people never intended the lives of the unborn to be protected by law. This false hypothesis was fabricated as follows.

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overruled by their legislatures which made abortion at any stage of pregnancy a crime. Comm. v. Parker, 50 Mass. 263 (1945), was immediately overruled by Mass. Acts & Resolves ch. 27 (1845). State v. Cooper, 22 N.J.L. 52 (1849), was immediately overruled by N.J. Laws at 266 (1849). Abrahams v. Foshee, 3 Iowa 274 (1856) was overruled by the next legislature, Iowa Rev. Laws, tit. XXIII, ch. 165. art. 2, sec. 4221 (1860).

A.

The Court first asserted as fact:

"When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman." Roe v. Wade, 410 U.S. at 148.

The only authority cited was a 20th century medical history book.[4] But this book only described the hazards of major surgery in general prior to Lister's discovery of antiseptics; the abortion operation was not mentioned anywhere in the entire book.

The 19th century obstetric authorities throughout the Western world prove that abortions by physicians were "perfectly safe" to the woman.[5] They prove the Court's assertion of fact to be false.

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4. Haagensen and Lloyd, A Hundred Years of Medicine 19 (1943), cited in Roe v. Wade, supra, at 148 n.43.

5. 2 T. Denman, M.D., An Introduction to the Practice of Midwifery 96 (1802). He was a standard English authority. They based their judgments on their own experience in performing abortions, and from hundreds of cases reported from around the world. In addition to perforation, other procedures were also safe. A French physician wrote "experience has proved that the dangers of the operation are reduced to a small

The Supreme Court never revealed the "hazardous" abortion "procedure" to which it was referring. Actually, the 19th century physicians generally used the ancient method,[6] which one physician traced back 2000 years,[7] and which they described as "perfectly safe" to woman.

The Court did not examine even one 19th century obstetric textbook; and they prove its assertion, "the procedure was a hazardous one for the woman," to be false.

Since abortion was not dangerous to the life of the mother, the only motivating

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matter." A.L.M. Velpeau, M.D., A Complete Treatise on Midwifery 530 (4th Am. ed. 1852). The preeminent American physician wrote "to the mother there is very little danger." H.L. Hodge, M.D., The Principles and Practice of Obstetrics 293 (1864).

6. Dr. Denman, a standard authority in England, wrote in 1802: "the membranes of the ovum are punctured," which permitted "the discharge of the waters," which induced the "action of the uterus," which resulted in the expulsion of the fetus from the womb, which was "perfectly safe" to the woman. 2 Denman, supra, at 96-99.

7. F. Ramsbotham, M.D., The Principles and Practice of Obstetric Medicine 724 (4th ed. 1856).

purpose the abortion statutes could have had was to protect the lives of the unborn from destruction by abortions, even safe abortions by physicians. Had it been the purpose of the legislators to only protect the mother, they would have simply required abortions, which were known all over the western world to be safe to the mother, to be performed only by physicians.

B.

The Court next asserted: "Abortion mortality was high."[8] This is asserted as fact. The Court cited no authority to support it. The 19th century obstetric authorities prove this assertion to be false; their medical texts show that the abortion operation was "perfectly safe."

The purpose of the Court's false assertion of fact is to go beyond the mere theory that abortion was hazardous to the mother, and infer that the carnage was so

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8. Roe v. Wade, 410 U.S. at 149.

great as to call for legislation to protect women from the medical profession.

C.

Upon these two false assertions of fact, the Court next falsely inferred:

> "[A] State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." Roe v. Wade, 410 U.S. at 149.

This is a false inference, drawn from two false assertions of fact. Moreover, the 19th century treatises on criminal law expressly stated that these abortion statutes were intended to supplant the ancient common law and protect the lives of the unborn during all stages of gestation:

> "The notion that a man is not accountable for destroying the child before it quickens, arose from the hypothesis that quickening was the commencement of vitality with it, before which it could not be considered as existing. This "absurd distinction" ... is now exploded in medicine.... The foetus is certainly ... as much a living being immediately after conception, as at any other time before delivery.
>
> ....
>
> "There is as much vitality ... on one side of quickening as on the other, and ... the infant is as much entitled to

> protection ... a week before it quickens as a week afterwards.... Acting under these views, the legislatures ... passed acts making ante-quickening-foeticide individually penal." 1 F. Wharton, A Treatise on the Criminal Law of the United States 656-57 (5th ed. 1861).

There is no 19th century authority to the contrary. If the purpose of these laws had been to protect the mother, and not the child, these texts would certainly have noted such an important thing.

And State supreme courts ruled that these statutes protected the unborn:

> "(T)he statute ... essentially changed the common law. There is a removal of the unsubstantial distinction, that it is no offense to procure an abortion, before the mother becomes sensible of the motion of the child, notwithstanding it is then capable of inheriting an estate.... It is now equally criminal to produce abortion before and after quickening." Smith v. State, 33 Me 48 (1851).

Since abortions by physicians were known all over the western world to be safe to the mother, the motivating purpose of these abortion laws could only have been to protect the lives of unborn children from destruction from abortions. That

legislatures prohibited safe abortions by physicians, despite the great danger to the mother from abortions by criminals,[9] shows their great respect for unborn life.

D.

The Court next made its irrelevant study of the single word "person," and held it "does not include the unborn":

> "(O)ur observation ... that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Roe v. Wade, 410 U.S. at 158.

The Court could not find even one 19th century authority to support this result; the whole weight rests on the Court's "major portion - far freer" assertion, which is false.[10] The reverse is closer to

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9. "In thirty-four cases of criminal abortion ... twenty-two were followed...by death, and only twelve were not. In fifteen cases necessarily induced by physicians, not one was fatal." H.R. Storer, M.D., On Criminal Abortion in America 43 (1860)

10. The ancient common law only prevailed in the early 19th century. By mid-century, a majority of the States which ratified the Amendment had already enacted statutes

the truth. The evidence indicates that legal abortion was far freer in 1973, than when the Amendment was adopted.[11]

The Court's "major portion - far freer" doctrine, were it even true, is absurdly irrelevant[12] and ominously skirts

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which punished abortion throughout gestation. (Supra n.2) By 1868, over three-fourths had enacted such statutes; and shortly they were universal. In those few states with no statute, this Court cannot claim with assurance that the common law was any different. (Supra n.3) Thus the "prevailing law" for the last half of the 19th century; it was about the same as existed in most states in 1973; and "legal" abortion was not "far freer" then.

11. The statutes listed in Roe v. Wade, 410 U.S. at 140 n37, show that by 1973 four states permitted abortion on demand, while fourteen permitted abortions for other reasons not allowed in 1868. The statutes prevailing in 1868 only permitted abortions to save the life of the mother or child. Thus legal abortion was far freer in 1973 than in 1868, although in most states it was still about the same as it was in 1868.

12. The same thing could be said about "legal slavery," which really was "far freer" for the "major portion" of the 19th century than it is today. Would this prove a right to own a slave today? If the Court could ignore the events of 1860 to 1866 - it could plausibly reaffirm its Dred Scott rule that there was a right to own a slave.

the central issue of the law existing in 1868, and the reason for the vast change.

The Court's assertion that "legal abortion" was then "far freer" refers to the ancient common law that abortion prior to "quickening" was not a crime, on the theory that life began at "quickening." A physician, who helped draft Virginia's 1848 abortion statute, explained its purpose was to supplant this "exploded error":

> "(T)hat the embryo is endowed with an inherent vitality from the first moment of conception, and is therefore as much entitled to the protection of the law before the period of 'quickening' as after it, every well-informed physician must yield a ready assent. The old doctrine, once held by medical men ... that the foetus first becomes animated, or endowed with distinct vitality, at the moment when the sensation of quickening is experienced by the mother, has been long since banished from the domain of science ... and now only finds a retreat in the dark and ancient caverns of the common law.
> ....
> "(T)he civil rights of the unborn child are perfect from the very commencement of its being." L.S. Joynes, M.D., "Foetus in Utero," Virginia Medical Journal 179-180, 187 (1856).

The 19th century medical and legal authorities, with none to the contrary, condemned this ancient theory of life:

> "(I)t is the duty of every accoucheur earnestly to protest against the ancient theological and legal opinion that, prior to the fourth month, the embryo had no proper existence.... (T)he merest tyro in physiological investigations must be convinced of the falsity of all such opinions." H.L. Hodge, M.D., The Principles and Practice of Obstetrics 78 (1864).

Yet the Court exactly adopted, as constitutional law, a view of unborn life which the 1860 president of the AMA called "a barbarous physiology" and which courts ruled "never ought to have been the law anywhere,"[13] and which 19th century legislatures condemned as criminal. The AMA president said in urging States to protect all stages of unborn life:

> "This relic of a barbarous physiology needs to be exploded, and the truth should be generally promulgated, that, from the moment of conception, a new being is engendered." 13 Transaction of the American Medical Association 56-57 (1860).

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13. Mills v. Commonwealth, supra, 632.

The abortion statutes were urged by America's most eminent medical professors and physicians, and they were intended to protect all stages of unborn life:

> From the moment of fecundation, the new being becomes independent ... its individuality is complete.... (T)here is a progressive ... advancing from one degree of perfection to another. Every protection, therefore, which is extended by human legislation to the young infant ... should be equally effectual in securing the life of the embryo from the earliest period of its existence.[14]

The abortion statutes show the universal guarantee of life to "any person" was not based on "a barbarous physiology"; the Amendment recognizes that there is no time during unborn life that a rational line can be drawn to permit the killings.

But the Court accepted the medieval view, that life began at "quickening"

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14. H.L. Hodge, M.D., The Principles and Practice of Obstetrics 78 (1864). Hodge's "name had become a household word throughout the land" and his book "valued among the very first works on obstetrics ever issued from the American or foreign press." R. Penrose, M.D., Discourse on Life of H.L. Hodge 20-21 (1872)

(about 4 months), and arbitrarily enlarged it to "viability" (about 7 months), making a "liberty" to kill which even its only authority, the ancient common law, condemned as criminal. Thus the basis of the Court's decree that "the word 'person'... does not include the unborn." Thus 20th century constitutional law was founded on medieval medical theory which was rejected as false in the 19th century, and remains false today.

In short, the Court manufactured a constitutional right to kill, out of "an exploded error" that an ante-quick child was not alive, which the "merest tyro" knew to be false, and was universally condemned as "a barbarous physiology" found only in "dark and ancient caverns," which 19th century judges ruled "never ought to have been the law anywhere," and which legislatures condemned as criminal everywhere, in order to Dred Scott-like blast an exception to the guarantee of life to "any person," so

tens of millions of victims could be killed with impunity from criminal statutes. This is not law; it is murder under ruse of law.

The Court's arbitrary shopping among medieval notions, rejected by the framers as "barbarous," to define the unalienable guarantee of life to "any person," is a another murder gun precedent pointed at the head of all Americans; it makes everyone a hostage of this Court; judges can arbitrarily pull its trigger to destroy anyone.

The Court now has bloody precedent for doing the most forbidden act; it directly defied the unalienable guarantee of life to "any person," the two most important words ever written into law, and condemned to death millions of victims whom the U.S. Constitution endeavors to preserve. It can now happen to anyone; the Court has cancelled the "unalienable" guarantee of life to "ALL," and sealed it in blood.

E.

In construing its equivalent word "everybody," the Supreme Court of West Germany ruled it did include the unborn:

> "No distinction can be made among the several stages of developing life before birth, or between prenatal and postnatal life." [Supra page 3 n.3]

The history of the criminal abortion statutes proves the framers made this same conclusion when they universally guaranteed life to "any person" without any exceptions: there is no time during unborn life that the law can withdraw its protection and permit the killings; rather it is the duty of the law to protect the weak.

Without need of assistance from Chief Justice John Marshall's burdens of proof, as described in the next section, history permits only one rational conclusion: the universal and "unalienable" guarantee of life to "any person" includes the unborn during all stages of unborn existence.

3.

THIS COURT CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" WHEN IT DEFIED THE RULINGS OF JOHN MARSHALL AND USED A "GUILTY UNTIL PROVEN INNOCENT" BURDEN OF PROOF TO INFER THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN.

The Court used the correct burden when it previously construed "any person."[1] Yet when it came to the unborn, it used a "guilty until proven innocent" burden.

A.

THE BURDENS, DESCRIBED BY CHIEF JUSTICE MARSHALL, PROVE THE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

Chief Justice John Marshall described the conditions the Court must satisfy to lawfully imply an exception to universal terms in the U.S. Constitution.

Before the Court can exclude the unborn from the guarantee of life to "any

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1. The Court properly ruled that the words "any person" included Chinese aliens, saying the words are "universal in their application, to all persons ... without regard to any differences." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). And this Court was so sure that the words "any person" included "corporations," it refused to even allow counsel to argue against it. Santa Clara v. So. Pac. RR, 118 U.S. 394, 396 (1886).

person," so they can be killed with impunity from criminal laws, the Court must prove that including the unborn within the terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application."[2]

The Court must prove that if the right to life of the unborn had "been suggested [to the framers] the language would have been so varied, as to exclude it,"[3] and the

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2. Sturges v. Crowninshield, 4 Wheat. 122, 202-203 (1819). When the Constitution uses universal words, and a case is "within the very words of the Constitution," it would be "dangerous in the extreme" to infer the case "is not within its spirit" because "we believe the framers of that instrument could not intend what they say" unless the "absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."

3. Dartmouth College v. Woodward, 4 Wheat. 518, 644-45 (1819). "It is not enough to say that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within

framers would have changed the guarantee to read: "Nor shall any state deprive any person, except unborn persons, of life ... without due process of law."

These are the burdens which protect the lives of all Americans from government sanctioned extermination, as happened in Nazi Germany; they carry the life of each American in their hands. The Court bears the heaviest burden of proof to imply an exception to the guarantee of life to "any person" so millions of victims can be killed with impunity from criminal laws.[4]

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the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd ... as to justify those who expound the constitution in making it an exception."

The Court used these burdens when it ruled it could not read its jurisdiction, which includes "all cases" arising under the Constitution, as if it merely said "some cases." Cohens v. Virginia, 6 Wheat 264 (1821); Martin v. Hunter's Lessee, 1 Wheat. at 339 (1816).

4. The truth of this extraordinary burden can be demonstrated by applying it to various cases. Before the Court could imply an exception to the universal terms "any person," so that Jews could be deliberately

Chief Justice Marshall's rules prove the guarantee of life to "any person" does include the unborn because "all mankind" would not unite "without hesitation" to exclude them. And the framers would not have changed the guarantee to read "any person - except the unborn," so it would be liberty to kill them, because the people had already enacted criminal statutes to protect the lives of the unborn by law. Thus the guarantee of life to "any person" does include the unborn.

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killed with impunity from criminal laws, the Court would have to prove that "the absurdity and injustice" of including Jews within the universal terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application." And the Court must prove that if the case of the Jews had been suggested to the framers, they would have changed the Amendment to read: "No state shall deprive any person, except Jews, of life without due process of law." This same burden protects us all.

B.

THIS COURT EXACTLY DEFIED THE BURDEN DESCRIBED BY CHIEF JUSTICE JOHN MARSHALL.

Instead of placing the burden on the advocates of the killings to prove that including the unborn within the guarantee of life to "any person" would "be so monstrous, that all mankind would, without hesitation, unite in rejecting the application," the Court reversed the burden:

First, the Court declared a "liberty" to kill the unborn with impunity from criminal laws, before it even looked to see if the guarantee of life to "any person" included the unborn.[5]

Second, subsequently, the Court looked to see if the guarantee of life to "any person" included the unborn.[6]

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5. Roe v. Wade, 410 U.S. at 153: "(T)he Fourteenth Amendment's concept of personal liberty ... is broad enough to encompass a woman's decision ... to terminate her pregnancy."

6. Roe v. Wade, 410 U.S. at 156-157. "The appellee ... argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment."

Third, the Court admitted that if the words "any person" included the unborn, its predetermined assertion of a "liberty" to kill the unborn "of course, collapses."[7] But the Court decreed a "liberty" to kill the unborn before it looked to see if the unborn had a "guaranteed" right to live.

Thus the Court had passed its sentence of death, before it even looked to see if the Constitution guaranteed a right to live. It is analogous to a court sentencing an accused to be hung before it even heard the evidence. As Alice's Queen demanded: "Sentence first; verdict afterwards."[8]

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7. Roe v. Wade, 410 U.S. at 156-157: "If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."

8. The vengeful Queen in "Alice in Wonderland" shouted "Off with her head" and when admonished that the jury must first consider its verdict, she said: "No! No! Sentence first- verdict afterwards."
So it was in Roe v. Wade - first the sentence of death; then the verdict whether the law allowed the victim to live.

Fourth, the Court's purpose for first predetermining a "liberty" to kill the unborn, was not only to shift the burden of proof from the advocates of the killings onto the unborn, but also to impose its heaviest "compelling" burden on the unborn, a burden of proof so devastating that state statutes seldom, if ever, survive it.[9]

Fifth, the Court stated that the evidence did not prove "with any assurance" that the guarantee of life to "any person" included the unborn.[10] This confirms that the Court placed the burden on the unborn to prove with "assurance" that the words "any person" included the unborn. This is the heaviest burden which can be imagined.

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9. Roe v. Wade, 410 U.S. at 155: "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.'" As its compelling state interest, Texas claimed that the lives of the unborn were protected by the Fourteenth Amendment. Id., at 156.

10. Roe v. Wade, 410 U.S. at 157. "Assurance" means: "To make certain and put beyond doubt." Black's Law Dictionary (4th ed. 1968).

Finally, by calling upon its false evidence to raise trifling doubts, the Court said that the unborn had not met their burden of proof and ruled "the word 'person' ... does not include the unborn."

If the Court used such burdens to decree a "liberty" to kill Jews, surely none would deny it would be murder. Judges may have more sympathy for other victims, but changing the name of the victims will not change the legal result.

When courts use such burdens to condemn victims to death, it can no longer be pretended it is still the government of the United States - any government of laws. This is still another "murder gun" precedent pointed at the head of every American; judges can arbitrarily use it to destroy anyone. The true burden proves beyond dispute that the guarantee of life to "any person" does include the unborn.

ROE v. WADE CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT USED "IRON CURTAIN" PROCEDURES TO IMPLY THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN; IT USED THESE PROCEDURES TO MAINTAIN ITS KILLINGS.

The Court effected Roe v. Wade by using unconstitutional "iron curtain" procedures in a mock trial without truth.[1]

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1. A. Denial of Assistance of Counsel
Counsel did not especially represent the unborn in the U.S. District Court in Roe v. Wade. And the U.S. Supreme Court denied a request by an original party to allow counsel to especially represent the unborn and defend their right to life. Thus, counsel did not represent the unborn at any stage of the original proceedings.

B. Denial of Prior Notice
The District Court did not even look to see if the lives of the unborn were protected by the U.S. Constitution; this question was argued for the first time after Roe v. Wade reached the Supreme Court. And the Supreme Court gave the parties no prior notice of the constitutional standards, or the burdens of proof, or the evidence, which the Court used to infer that the lives of the unborn were not protected by the U.S. Constitution. The first time the parties had notice was when Roe v. Wade was published, and the victims were already condemned to death. An original party objected that it lacked the prior notice needed to defend the unborn.

C. Secret Evidentiary Proceedings
The Court used some secret evidentiary process, not open to the parties, to find

And the Court maintains its killings by using "iron curtain" procedures in mock trials without truth, despite continual objection that the Court was using criminal procedures to maintain its killings:

1. The Supreme Court willfully refuses to allow retained (no cost to taxpayers) counsel to represent the victims being

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evidence to infer that the lives of the unborn were not protected by the U.S. Constitution. An original party objected that the Court's facts were "unknown to the parties" and it never had opportunity to cross-examine the Court's evidence.

D. Denial of Right to Cross-Examine

An original party asked permission to cross-examine the evidence which the Court used to infer that the lives of the unborn were not protected by the Constitution. Since the Court found its evidence in secret proceedings, the parties had not previously seen the evidence. But the Supreme Court would not allow its evidence to be cross-examined.

E. Denial of Right to Present Evidence

An original party asked permission to present evidence under the new constitutional standards, which it had not seen before, to show that the lives of the unborn are protected by the Constitution. But the Court refused to allow it. And thus the killings commenced.

killed and defend their right to life.[2]

2. The Supreme Court willfully refuses to allow its evidence in Roe v. Wade, which it used to infer that "the word 'person'...

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2. Some of the cases are: Colautti v. Franklin, 439 U.S. 379, motion to allow counsel for the unborn denied 437 U.S. 902; Anders v. Floyd, 440 U.S. 445, motion to allow counsel for the unborn denied 439 U.S. 890; Bellotti v. Baird, 443 U.S. 622, motion to allow counsel for the unborn denied 439 U.S. 1065; Ashcroft v. Freiman, affirmed 440 U.S. 941, motion to allow counsel for the unborn denied, 440 U.S. 941; United States v. Zbaraz, 448 U.S. 358, motion to allow counsel for the unborn denied 444 U.S. 1030; Harris v. McRae, 448 U.S. 297, motion to allow counsel for the unborn denied 445 U.S. 941; H.L. v. Matheson, 450 U.S. 398, motion to allow counsel for the unborn denied 445 U.S. 959; Simopoulos v. Virginia, 462 U.S. 506, motion to allow counsel for the unborn denied 458 U.S. 1104; Planned Parenthood of Kansas City v. Ashcroft, 462 U.S. 476, motion to allow counsel to for the unborn denied 458 U.S. 1104; Akron Center for Reproductive Health v. Akron, 462 U.S. 416, motion to allow counsel to for the unborn denied 458 U.S. 1104; Diamond v. Charles, 476 U.S. 54, motion to allow counsel for the unborn denied 473 U.S. 932; Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, motion to allow counsel for the unborn denied 473 U.S. 931; Hartigan v. Zbaraz, 98 L Ed 2d 478 (1988), motion to allow counsel for the unborn denied 479 U.S. 1003.

does not include the unborn," to be confronted and cross-examined.[3]

3. The Supreme Court willfully refuses to allow evidence to be presented to show that the Constitution's unalienable guarantee of life to "any person" includes the unborn.[4]

These are basically the procedures cited by the Nuremberg Court as part of the evidence to convict the Nazi judges of complicity in extermination and murder.[5]

The Supreme Court's own rulings on due process of law show these procedures to be

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3. See cases, supra note 2.

4. See cases, supra note 2.

5. "The trials ... did not approach even a semblance of ... justice. The accused ... were denied the right to introduce evidence, to be confronted by witnesses against them.... They were ... denied the right of counsel of their own choice.... (P)roceedings ... were secret." United States v. Altstoetter, supra, at 1046-47 (1951). "Such a mock trial is not a judicial proceeding but a murder." Id., at 1164. "The prostitution of a judicial system for the accomplishment of criminal ends involves an element of evil to the State which is not found in frank atrocities which do not sully judicial robes." Id., at 1086.

unconstitutional,[6] and the willful use of these procedures to be criminal.[7]

If the Court had used these procedures to decree it "liberty" to kill Jews, it

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6. Even in civil proceedings (such as where loss of welfare is threatened) due process guarantees (1) prior notice of the factual and legal bases; (2) the right to assistance of counsel; (3) the right to cross-examine adverse evidence; and (4) the right to present evidence. Goldberg v. Kelly, 397 U.S. 254, 268-271 (1970). See also, In Re Gault, 387 U.S. 1 (1967).

Could it be possible that procedures, which could not be used to deprive a mother of welfare, could be used to exclude her from the protection of the U.S.Constitution so that she could be killed with impunity from criminal laws? This is preposterous.

The Constitution would not permit any court to condemn even one single Jew to death in a criminal case, but deny any of these procedural rights. Then neither can it permit any court to condemn all Jews in the United States to death, but deny any of these procedural rights, by calling it a civil proceeding, and decreeing the lives of all Jews are not protected by the U.S. Constitution, and it is "liberty" to kill all Jews with impunity from criminal laws.

Any victim is entitled to all the procedural protections before any court can decree that the victim's life is not protected by the Constitution, and the victim can be killed with impunity from criminal statutes.

7. "Even judges ... could be punished criminally for willful deprivations of constitutional rights." Imbler v. Pachtman, 424 U.S. 409 (1976).

would be condemned as murder. Judges may have more sympathy for other victims, but changing the names of the victims will not change the legal result.

The Court maintains its decree "MASS MURDER IS LIBERTY" by refusing to allow truth to work in its Court. No truth seeking process was left unbloodied. It is notorious that truth is not permitted to work in this Court, and that the Court falsifies history to achieve its ends.[8]

The record proves the Court used "iron curtain" procedures, a mock trial without

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8. "The Court ... has flouted the will of the framers and substituted an interpretation in flat contradiction of the original design.... Such conduct impels one to conclude that the Justices are become a law unto themselves.... It perilously resembles ... Hitlerism." R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 408-12 (1977).

"Court had adjourned in the real world and reconvened in Cloud Cuckooland. [The Justices] began to invent a country suited to their purposes.... They have falsified the American past ... and no one in charge seems prepared to do anything about it." T. Landers, To A Traditionalist, Mr. Ron Sounds So Good, Wall St. J., edit. page, Dec. 27, 1984.

truth, to do the most forbidden thing, to defy the guarantee of life to "any person" so millions of victims could be killed with impunity from criminal statutes; and the Court maintained its killings for fifteen years by using "iron curtain" procedures in mock trials without truth. In the words of the Nuremberg court, "Such a mock trial is not a judicial proceeding but a murder."

These procedures are still another "murder gun" precedent which this Court holds to the head of every American; everyone is now a hostage of this Court; judges can use this "iron curtain" process to destroy anyone. The process makes Roe v. Wade void.[9]

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9. A more detailed description of the procedures is made in the MOTION TO ALLOW COUNSEL REPRESENT CHILDREN UNBORN AND BORN ALIVE, filed in this case, and incorporated by reference.

DUE PROCESS OF LAW HAS COMPELLED THE U.S. SUPREME COURT TO CONFESS IN COURT THAT IT IS GUILTY OF MASS MURDER, AND TO ADMIT THAT THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

For the 105th time, the U.S. Supreme Court is accused of criminally defying the guarantee of life to "any person" and exterminating millions of victims whom the U.S. Constitution endeavors to preserve.

For the 81st time, the U.S. Supreme Court is accused of mass murder in violation of state and federal statutes.

For the 85th time, this Court is accused of using criminal procedures to effect and maintain Roe v. Wade killings.

John Marshall would have called Roe v. Wade "treason to the Constitution."[1]

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1. Chief Justice Marshall wrote that this Court could not extend the Constitution "to objects not...contemplated by its framers." Ogden v. Saunders, 12 Wheat. at 332. If the Court usurped such power, it would be "treason to the Constitution." Cohens v. Virginia, 6 Wheat. at 404. By decreeing "liberty" to be the very thing which the framers had condemned to be "murder," the Court has indisputably extended the Constitution to objects not contemplated by its framers. For 15 years, "treason to the

But, for fifteen years, the U.S. Supreme Court has never denied the charges, much less attempted to prove the charges to be false. These facts are unparalleled in the legal history of the world.

Under this Court's own rulings, its silence year after year, while the victims

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Constitution" has masqueraded as "the supreme law of the land."

The Court supplanted the Constitution as the supreme law. Chief Justice Marshall wrote that "the Constitution derives its whole authority" from the consent of the governed. McCulloch v. Maryland, 4 Wheat. at 403. Yet, the Court now defies this consent; it simply invents a dream world and imposes it on the people by decree. A divided Congress is unable to control this Court, which results in rule by minority.

Thomas Jefferson warned that this Court was "the most dangerous" branch because judges were "installed for life, responsible to no authority (for impeachment is not even a scarecrow)"; and judges twist words to make "anything mean everything or nothing, at pleasure" with judges finally becoming "despots." Thus Roe v. Wade fully explained.

People have lost faith in the simple power of facts to prove: falsehood is called truth; murder is called liberty; treason is called law. This defeat of the consent of the governed as the basis of law is the most momentous revolution in human history. The way out was shown by Abraham Lincoln, who would "call things by their right names, no matter who was offended."

are being killed, is an admission that the charges are true.[2] In the Court's words:

> "Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question." United States v. Hale, 422 U.S. 171, 176 (1975).

The circumstances leave no doubt that due process has compelled the U.S. Supreme Court to confess that the charges are true.

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2. Under the tacit confession rule, failure to deny a charge is admissible as a confession that the charge is true. 4 Wigmore, Evidence, § 1071-1072 (Chadborn rev. 1972). "Underlying the rule is the assumption that human nature prompts an innocent man to deny false accusations and consequently a failure to deny a particular accusation tends to prove belief in the truth of the accusation." McCormick on Evidence, § 161 (1972). The Court has often affirmed this rule. "(T)he Court has consistently recognized that ... silence in the face of accusation is a relevant fact.... Silence is often evidence of the most persuasive character." Baxter v. Palmigiano, 425 U.S. 308, 319 (1976). And the rule is ancient. As Socrates cross-examined at his trial 2400 years ago: "(Y)ou are silent, and have nothing to say. But is not this rather disgraceful, and a very considerable proof of what I was saying?" "I may assume that your silence gives consent." Plato 41, 45 (Jowett tr. 1942).

First, the evidence makes it as clear as daylight why the Court is silent in the face of the charges: the charges are proved to be true.[3] Truth cannot be proved false.

Second, the charges were made in cases filed pursuant to the Constitution and laws of the United States. Chief Justice John Marshall ruled that judges who "close their eyes on the Constitution" and "condemn to death those victims whom the Constitution endeavors to preserve" commit "crime."[4]

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3. The Court decreed killings to be "liberty" which States had defined to be "murder." This is mere historical fact; no denial is possible. As John Marshall said, "a fact which has existed cannot be made never to have existed." Marbury v. Madison, 1 Cranch at 167 (1803).

4. Marbury v. Madison, 1 Cranch 137, 179-180 (1803). This correctly states the criminal law. Where there is an affirmative duty to act, the deliberate omission to do that duty, which results in death to others, can be prosecuted as homicide. Perkins, Criminal Law 604 (2nd ed. 1969).

The only Nazi to plea guilty at Nuremberg cited this law. When warned of Auschwitz, Speer wrote: "I did not investigate - for I did not want to know what was happening there.... From fear of discovering something which might have made me turn from my course, I closed my eyes." A. Speer, Inside the Third Reich 375-76

The Court had a legal duty to fully hear allegations that Roe v. Wade was wrongly decided. The Court affirmed its duty:

> "(I)ts opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." The Passenger Cases, 7 How. 282, 470 (1849).

Third, the Court's steadfast silence for fifteen years in the face of the scores of accusations is unparalleled in the legal history of the world; the Court cited this very circumstance as making confession by silence more trustworthy.

> "Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation." United States v. Hale, 422 U.S. 171, 176 (1975).

Fourth, not only has the Court's silence persisted in the face of repeated accusations, but it has persisted even in

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(1970). This "deliberate blindness" is complicity in criminal extermination.

the teeth of warnings that its silence was being taken as an admission that the charges are true.

Fifth, the charges described judicial crimes not surpassed in all history, that (1) judges had done the most forbidden thing, and defied the unalienable guarantee of life to "any person," the two most important words ever written into law, and criminally exterminated millions of children; (2) the United States was being ruled by the most corrupt decree which the human mind could even imagine: "MASS MURDER IS LIBERTY"; (3) due process of law had compelled the judges to confess to guilt of mass murder; and (4) the judges schemed to reaffirm the legitimacy of their murders in mock trials designed to keep truth from working in all state and federal courts.[5]

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5. In Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), the Court reaffirmed Roe v. Wade by stare decisis in a mock trial without truth.

The parties did not ask the Court to overrule Roe v. Wade. This was done by the amicus curiae brief by the Legal Defense

The United States being ruled by the decree "MASS MURDER IS LIBERTY" is the most catastrophic crime in the history of civilization; it smashes the hopes of the whole human race for a government of laws, and

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Fund for Unborn Children, as follows: "For the 52nd time, the U.S. Supreme Court is accused in its own court with mass murder." The amicus brief laid out the evidence, and concluded: "THE U.S. SUPREME COURT HAS CONFESSED IN COURT TO GUILT OF CRIMINAL EXTERMINATION, INCLUDING MASS MURDER, AND THIS IS THE LEGAL EQUIVALENT OF THE EXPRESS OVERRULING OF ROE v. WADE." But this Court responded to these arguments by saying:

> And arguments continue to be made, in these cases as well, that we erred in interpreting the Constitution. Nonetheless, the doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law. We respect it today, and reaffirm Roe v. Wade.

Thus, the Court's response to "arguments" that it was guilty of mass murder. When a court rules that its decree "MASS MURDER IS LIBERTY" must be obeyed without a hearing or even a question, then history could not reveal a more murderous mockery of "the rule of law." The Court hid behind stare decisis in a mock trial and used this ruse of law to defraud all lower courts into obeying Roe v. Wade without question.

reduces government to the matter of which murderer can grab power and be obeyed.

Never in the legal history of the world was it more imperative to deny charges if they were untrue. Judges, under solemn legal duty to uphold the law, are accused of mass murder. The evidence is laid out in court. The judges have done the most forbidden thing, and defied the guarantee of life. Little children are being killed. The killings violate criminal statutes. Pictures of the dead are shown to the judges. But for 15 years the judges do not meet the evidence; do not prove it false.

A government of laws can permit only one conclusion to be drawn from these facts: The U.S. Supreme Court was met in court with the truth; truth worked in the only manner in which it was permitted to work; and due process of law compelled this Court to admit, in the most emphatic manner which the mind can imagine, that the words "any person" do include the unborn.

Any judge who closes his eyes on these facts, and chooses to take part in a national scheme to kill little children, in defiance of the guarantee of life to "any person," and criminal statutes, to maintain the decree "MASS MURDER IS LIBERTY," knows he is guilty of complicity in mass murder and criminal defiance of the Constitution.[6]

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6. Roe v. Wade asserted to legalize killings which statutes had made criminal. Since Roe v. Wade is a mistake of law, all the killings since 1973 can be prosecuted.

The ex post facto provisions of the U.S. Constitution do not apply to judicial decisions which are a mistake of law. Ross v. Oregon, 227 U.S. 150, 161 (1912).

The general rule is that mistake of law is no excuse for breaking the law. R. Perkins, Criminal Law 920 (2d ed. 1969).

The limited affirmative defense of reasonable reliance on an official judicial opinion, thereafter determined to be a mistake of law, does not apply to homicide cases. Model Penal Code, Tentative Draft No. 4, Comments Sec. 2.04, page 138; R. Perkins, Criminal Law 928 (2d ed. 1969).

Thus, the law applied at Nuremberg applies to this case. Obedience to the orders of judicial superiors is no excuse for complicity in murder. United States v. Altstoetter, supra, at 983-985.

Perhaps judges responsible for the Roe v. Wade murders did not believe they were breaking the law. But as Oliver Wendell Holmes wrote: "Ignorance of the law is no excuse for breaking it.... It is no doubt true that there are many cases in which the

In explaining how the Nazi regime got away with its monstrous crimes, Winston Churchill quoted Machiavelli: "Men avenge slight injuries, but not grave ones." The Court knows that truth well; the legal foundation of the United States now rests on the assumption that the gravest crime in history cannot be avenged.

The photo on the last page shows a second stage abortion under Roe v. Wade. If the child were born alive, this Court would be guilty of murder. If the child were born

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criminal could not have known that he was breaking the law, but ... the lawmaker has determined to make men know and obey." O.W. Holmes, The Common Law 41 (1963).

Even if the Supreme Court held a gun to the head of a lower judge, and threatened death unless he obeyed Roe v. Wade, it would not be a defense to murder, for "he ought rather to die himself than escape by the murder of an innocent." 4 Bl. Com. 30.

The law makes a mortal distinction between killing and not killing: (1) any judge who stopped the Roe v. Wade killings, and made a mistake of law, could only be overruled on appeal; (2) but any judge who allows the killings to continue and makes a mistake of law, can be convicted of murder, and be sentenced to death. The law of capital murder is a hard school, where lessons are taught only one time, and mistakes of law are not forgiven.

dead, this Court would be guilty of extermination under 18 U.S.C. § 242.

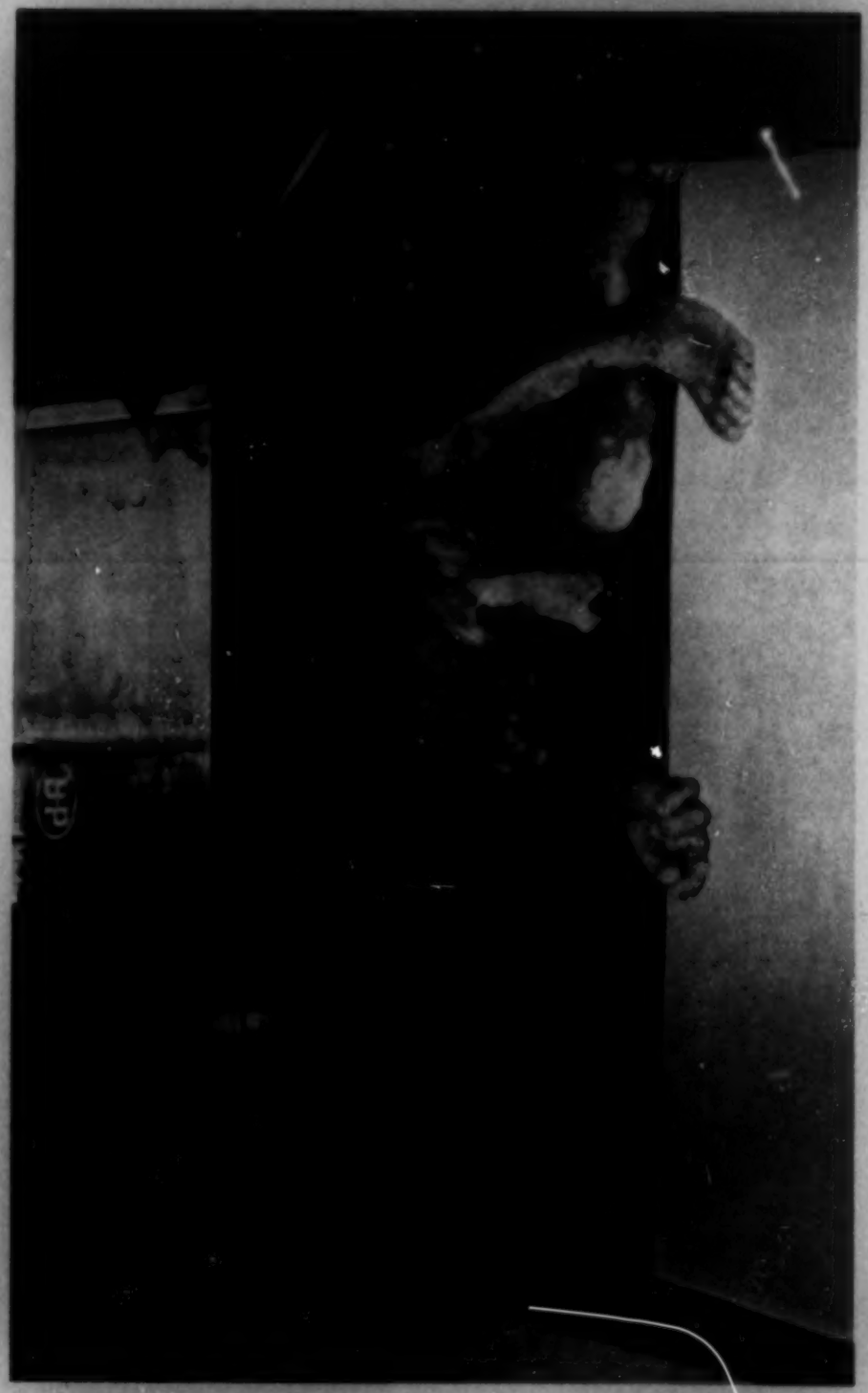
Truth has worked in this Court; judges cannot stop it. Due process has compelled this Court to admit that the unalienable guarantee of life to "any person" does include the unborn.

CONCLUSION

Merely overruling Roe v. Wade will simply continue its crimes, perhaps on a less extensive scale. The Court misguided this nation and the entire world.

Now the Court must promulgate the truth, that the universal and unalienable guarantee of life to "any person," made in the Fifth and Fourteenth Amendments of the U.S. Constitution, do include the unborn, and States have a duty to protect unborn life.

Alan Ernest
Counsel



(11) (12)

Nos. 89-1391, 1392

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DR. IRVING RUST, ET AL.,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

THE STATE OF NEW YORK, ET AL.,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* PLANNED PARENTHOOD FEDERATION OF AMERICA AND THE NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION IN SUPPORT OF PETITIONERS

Dara Klassel
(*Counsel of Record*)
Eve W. Paul
Barbara E. Otten
PLANNED PARENTHOOD FEDERATION OF AMERICA
810 Seventh Avenue
New York, New York 10019
(212) 541-7800

James L. Feldesman
Susan D. Lauscher
FELDESMAN, TUCKER, LEIFER, FIDELL AND BANK
2001 L Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 466-8960

Attorneys for Amici Curiae

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STATEMENT OF INTEREST OF AMICI[1]

Planned Parenthood Federation of America (PPFA) is a not-for-profit New York corporation. It is the leading national voluntary public health organization in the field of family planning. PPFA has 172 affiliates which operate 879 clinics in 48 states. Planned Parenthood clinics offer a broad range of family planning methods and related medical and educational services. Fifty-four affiliates offer abortion services. All affiliates are required by PPFA medical standards to offer counseling to pregnant women on all options for handling the pregnancy, including carrying to term, adoption and abortion. Affiliates must provide referral to whatever service the patient requests.

One hundred and thirty-five Planned Parenthood affiliates receive grants under Title X of the Public Health Service Act, amounting to approximately $34,000,000 in federal funds. On February 2, 1988, PPFA filed suit on behalf of those affiliates[2] in the federal district court for the district of Colorado, seeking a nationwide injunction against enforcement of the regulations at issue in this case. On February 15, 1988, ruling from the bench, the court granted the requested relief, enjoining the defendant from enforcing the regulations against any Planned Parenthood affiliate.[3] *Planned Parenthood Federation of America v. Bowen*, 680 F. Supp. 1485 (D. Colo. 1988) (preliminary injunction order incorporating bench ruling *nunc pro tunc*). On June 15, 1988, the court issued a permanent injunction. 687 F. Supp. 540 (D. Colo. 1988). Defendant appealed to the United States Court of

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1 The parties have consented to the filing of this brief in letters on file with the Court.

2 Other named plaintiffs in the case included the two Planned Parenthood affiliates in Utah and Colorado, Boulder Valley Women's Clinic, and three physicians. The lawsuit specifically excluded any affiliate which was at that time a plaintiff in any other case challenging the regulations. The Planned Parenthood affiliates which are plaintiffs in the instant case are not, therefore, the subject of the Colorado case.

3 The injunction did not extend to the Planned Parenthood affiliates which are the plaintiffs in this case. *See supra* note 2.

Appeals for the Tenth Circuit; argument was heard on May 11, 1989; and a decision is pending.

PPFA's interest in this case is direct and immediate. The outcome of this case may well determine whether Planned Parenthood affiliates will be forced to choose between the loss of millions of dollars in federal funds and compliance with requirements which are directly at odds with their organizational standards, standards of good medical care and medical ethics.

National Family Planning and Reproductive Health Association (NFPRHA) is a nonprofit membership corporation designed to improve and expand the delivery of comprehensive family planning and reproductive health care information and services throughout the United States. NFPRHA's membership, which includes family planning clinics, community health centers, state and local health departments and PPFA affiliates, comprise 85 percent of the agencies and organizations that operate family planning programs with funds received under Title X.

On February 2, 1988, NFPRHA filed suit on behalf of its membership in the federal district court for the district of Massachusetts, challenging the regulations at issue in this case.[4] That court issued a nationwide injunction on March 3, 1988. *Commonwealth of Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988). On appeal, the Court of Appeals for the First Circuit, sitting *en banc*, affirmed. 899 F.2d 53 (1st Cir. 1990). The government petitioned this Court for certiorari and decision on that petition is pending. No. 89-1929.

Like PPFA, NFPHRA's interest in this case is direct and immediate. The outcome of this case may well determine the rights of its members to continue to provide medically sound and ethical health care while receiving millions of dollars in federal grants.

Amici have a unique contribution to make to this case. This brief calls upon the vast experience of their membership (collectively representing 90% of the 3,900 Title X-funded clinics) in administering family planning programs as well as

4 Plaintiffs in that suit include the Commonwealth of Massachusetts, several local reproductive health organizations and physicians. Excluded from the suit are members suing elsewhere, such as affiliates of PPFA.

the voluminous records developed in their lawsuits challenging the new Title X regulations. This experience will show the profoundly destructive impact which the new regulations would have on the health and critical life choices of the millions of women the federal program was designed to serve.

SUMMARY OF ARGUMENT

The new regulations violate the first amendment because they have a significant coercive effect on the exercise of the right to receive information. Unlike other conditions on the receipt of government funds this Court has dealt with in the past, the new regulations affirmatively harm the intended beneficiaries of governmental assistance. The regulations' blend of censorship and coerced speech leave a woman worse off for having accepted the government's offer of aid than she would be if the government had never created a family planning program. By offering medical care and then, without warning, withholding information that is an integral and expected part of that care, the government has effectively suppressed the receipt of information necessary to make critical life decisions.

The regulations similarly violate the right to privacy. By interfering with the flow of information between health provider and patient, the regulations erect an affirmative obstacle to a woman's exercise of the right to choose between abortion and childbirth.

The regulations are not rationally related to any legitimate state interest. If that constitutional test has any meaning, it must be that government may not achieve even its legitimate ends by the suppression of information. To do so undermines our status as a free people.

The regulations also violate the Title X statute. First, they redefine the funds subject to the statute's abortion prohibition in a manner that contradicts the plain meaning of the statute. Second, by prohibiting medically appropriate referrals and instituting onerous separation requirements between

the Title X program and other health services, they violate Congress' intent that the Title X program be coordinated with, and, where possible, integrated into other health programs.

ARGUMENT

STATEMENT OF FACTS[5]

Scope of the Program

Title X of the Public Health Service Act, 42 U.S.C. § 300 *et seq.* (Title X), is a program of federal grants to public and private organizations to support family planning projects.[6] Typical recipients of Title X funds are private non-profit health services organizations, such as affiliates of Planned Parenthood Federation, other reproductive health centers, comprehensive community health centers, hospitals and governmental entities such as state, county and city health departments.[7] Pursuant to Congress' intent, the clients served are predominately poor.[8]

5 Throughout this brief, the abbreviation "J.A." refers to the parties' Joint Appendix; "C.A." refers to the Appendix to the Petition for Certiorari and "A" refers to the Appendix set out at the end of this brief. The latter contains affidavits filed in the district court in the case of *Planned Parenthood Federation of America v. Bowen*. *See supra* page 1.

6 Currently Title X supports 3,900 free-standing and hospital based clinics nationwide which collectively serve nearly 4.5 million women per year. Morley affidavit, ¶ 6 (J.A. 224-25).

7 Forrest, *Delivery of Family Planning Services in the United States*, 20 Fam. Plan. Persp. 88, 92 (1988).

8 Title X was intended to insure that no person is denied access to family planning assistance because of his or her inability to pay. *See* Senate Report No. 91-1004, 91st Cong., 2d Sess. 12 (1970), ([the bill] "will enable us to make services more readily available to the more than 5 million poor and near-poor women, who, for the most part, have not been given the opportunity to avail themselves of family planning services. . . ."); House Report No. 91-1472, 91st Cong., 2d Sess. 11 (1970) ("With this legislative action a significant forward thrust can be given to the provision of services to all those who want them but cannot afford them . . ."). The statute

Pursuant to congressional and regulatory design, Title X family planning projects are "comprehensive" in scope. Congressional Declaration of Purpose (1); 42 U.S.C.A § 300, Historical Note. Services offered include counseling, provision of birth control methods, physical examinations, screening and treatment for sexually transmitted diseases, screening for cervical and breast cancer[9], pregnancy testing, treatment of minor gynecological disorders, infertility services, and referral to all medical services not provided by the program. 42 C.F.R. § 59.5 (a)(1), (b)(1) and (2)(1988). *See generally* Program Guidelines for Project Grants for Family Planning Services (1981) (J.A. 67-72).

Title X also funds developing and making available to the public educational and informational materials on family planning and population. 42 U.S.C. § 300a-3(a). Projects funded include libraries which contain resource materials for educators, students and other individuals.[10]

Abortion in the Title X Program

Counseling and referral for abortion services are no exception to the broad scope of Title X services. Although Title X projects may not provide abortions, 42 U.S.C. § 300a-6, since the inception of the program professionals have been permitted and encouraged to provide information about abortion provided it is "nondirective."[11] As the official charged with administering the program told the family plan-

requires that projects give assurances that priority will be given to furnishing of services to persons from low income families and no charge be made for services to such persons. 42 U.S.C. § 300a-4 (c)(1) and (2). More affluent patients are charged fees based on ability to pay, and persons who are able pay full fee for services. 42 C.F.R. § 59.5(a)(8).

9 Congress has frequently and favorably cited Title X clinics as important sources of "preventive health care" beyond the provision of contraceptives. *See, e.g.*, House Report No. 95-1191, 95th Cong., 2d Sess. 30 (1978).

10 Galloway affidavit, ¶¶ 18-26 (A-14-A-15).

11 *See, e.g.*, General Accounting Office, Restrictions on Abortion and Lobbying Activities in Family Planning Programs Need Clarification (September 24, 1982) (J.A. 107-108).

ning field in 1976, counselors have "not only a First Amendment right but duty to inform a patient of all legal options."[12]

Discussions of pregnancy and abortion are an inevitable and integral part of any program that provides medically-based family planning services.[13] Such discussions arise in many contexts for pregnant and nonpregnant patients.

First, information about the availability of abortion must be given to nonpregnant patients because it is relevant to choice of contraceptive method. Women considering an intrauterine device (IUD) must be counseled that if they become pregnant with the IUD in place, they may have to consider abortion because of the risk of an infection which can be life-threatening.[14] This information may influence the woman's choice of method, but also may be critical in saving her life should she later become pregnant with the IUD in place.[15] A woman choosing other methods of family planning also needs information about the availability of abortion as a backup if contraception fails. For example, women who need highly effective contraception and, for medical reasons, cannot use oral contraceptives or IUDs, may have to choose between permanent surgical sterilization and less effective temporary methods such as the diaphragm or condom. It is relevant to

12 Memorandum from Deputy Assistant Secretary for Population Affairs, Louis Hellman, to Hilary Connor, Regional Health Administrator, DHEW Region VIII (November 19, 1976) (C.A. 74a). 1981 Program Guidelines codified this policy by requiring that women diagnosed as pregnant in Title X clinics be offered nondirective counseling about all options for managing a pregnancy, including abortion, adoption, and keeping the child, and referred to any of those services upon request. Program Guidelines for Project Grants for Family Planning Services (C.A. 71a).

13 The Secretary depicts the new regulations as limiting the Title X program to "preconceptional" family planning services. 42 C.F.R. § 59.2 (1988). While such a limitation might be possible in a program which simply hands out nonprescription methods of birth control, such as condoms, any family planning program which offers prescription methods, which require medical examinations and screening to rule out pregnancy, cannot make such an artificial distinction. *See infra* note 17, and accompanying text.

14 21 C.F.R. § 310.502 (1989).

15 Grimes declaration, ¶ 11 (A22).

such a woman's decision that the effectiveness of the diaphragm or condom is enhanced by the availability of early abortion as a backup should those contraceptives fail and that such abortions carry a comparatively small health risk.[16]

The second major clinical setting for discussion of abortion is when pregnancy is diagnosed. This can occur in the course of the physical examination that must accompany the provision of all prescription contraceptive methods[17]; when a contraceptive provided by the Title X project fails[18]; and when the project provides pregnancy testing to non-family planning patients, a service required by the federal Title X guidelines.[19]

The counseling given pregnant women is voluntary, nondirective and includes all options: abortion, carrying to term and keeping the child, and carrying to term and relinquishing the infant for adoption. Where appropriate, pregnant women are also given information about genetic or congenital problems which could arise, and about steps to take for diagnosis and treatment of these problems. Women are also given information on the importance of early prenatal care, good nutrition, and on dangers to the woman and developing fetus such as cigarettes, certain drugs, alcohol, and environmental hazards. All women are given specific referrals to providers

16 Jones declaration, ¶¶ 12-15 (A-24-A-26); *see also* Sammons affidavit, ¶ 14 (J.A. 267).

17 Program Guidelines, *supra* note 12 at § 8.3 (J.A. 67). Before prescribing oral contraceptives, it is imperative to rule out pregnancy because of the possible adverse effects of the drugs on the fetus, 21 C.F.R. § 310.501 (2)(iv) and (3)(viii)(1989); insertion of an IUD in a pregnant uterus can cause a miscarriage. 21 C.F.R. § 310.502.

18 Failure rates range from user failure rates of 26% for spermicides to 6% for the Pill; Jones and Forrest, *Contraceptive Failure in the United States: Revised Estimates from the 1982 National Survey of Family Growth*, 21 Fam. Plan. Persp. 103, 109 (1989).

19 Program Guidelines, *supra* note 12 at § 8.6 (C.A. 71a). The Guidelines state that pregnancy testing is one of the most frequent reasons for an initial visit to a family planning clinic, particularly for adolescents. "It is therefore important to use this occasion as an entry point for providing education and counseling about family planning." *Id. See, e.g.*, affidavit of Paul Drisgula, ¶ 8 (J.A. 150).

of the health services appropriate to their choices and medical needs.[20]

When a woman's health is endangered by her pregnancy, counseling regarding her options is particularly urgent. Such situations include diabetes, cardiac disease, certain cancers, and pregnancy with an IUD in place which cannot be removed. In these instances a physician must advise a woman that abortion is an option she should consider and, if she should so choose, provide her with an immediate referral to a provider of abortion services.[21] Delay in seeking services in these situations can lead to increased health risks, both from later abortions and from the woman's worsening medical condition.[22] Prompt counseling and referral are also critical when a fetus may be affected with a genetic or congenital disorder. For example, a woman who carries the HIV virus which causes AIDS needs to know as early as possible the chances that the virus will be transmitted to the fetus so that she can avail herself of a safe early abortion if she so chooses.[23]

Title X projects also provide factual information about abortion in educational materials regarding family planning, reproductive health and sexuality. Title X supported libraries contain books on the history and medical aspects of abortion.[24]

All the foregoing is information Title X projects were until now permitted and encouraged to provide as part of a comprehensive, ethical and medically sound[25] family planning program. The new regulations radically change all this, replacing good health care and unbiased informational services with censorship and propaganda.

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20 Program Guidelines, *supra* note 12 at § 8.6, (C.A. 71a). Clark declaration, ¶¶ 5-6 (A-2); Vernon declaration, ¶ 6 (A-28); Galloway declaration, ¶¶ 9-10 (A-18); Jones declaration, ¶ 6 (A-25).

21 Grimes declaration, ¶¶ 9,10 (A-21-A-22).

22 *Id.* at ¶¶ 8,9,10.

23 *Id.* at ¶ 12.

24 *See, e.g.*, Galloway declaration, ¶¶ 18-26 (A-14-A-15).

25 Sammons affidavit (J.A. 260-69); Morley declaration (J.A. 223-31).

The New Regulations

Under the new regulations, personnel in Title X projects are barred from discussing abortion with pregnant patients or even telling a woman where legal abortions are available. Even in response to specific questions, providers may answer only that the Title X project "does not consider an abortion an acceptable method of family planning." 42 C.F.R. § 59.8(b)(5). The prohibition applies regardless of the woman's medical condition (except for emergencies), her risk for transmitting congenital or genetic disorders to the fetus, or her expressed preference.

Instead of counseling and referral appropriate to each patient's needs, *all* pregnant women must be handed a list of providers of prenatal care and/or social services which "promote the welfare of mother and unborn child." 42 C.F.R. § 59.8(a)(2). No provider whose principal business is provision of abortion services may be included on the list and the list *must* include providers of prenatal care or social services that do not provide abortions. *Id.* at § 59.8(a)(3) and (b)(4). Title X projects may not identify abortion providers on the list or those agencies likely to provide information about abortion, including their own separately-funded programs that provide such information.[26]

Discussion of abortion in the contraceptive context is limited to provision of information medically necessary to assess the risks and benefits of contraception but which does not constitute counseling with respect to abortion or promotion of abortion as a method of family planning. *Id.* at § 59.8(a)(4). The examples that accompany this provision indicate it will be narrowly construed to allow only the handing to the woman of printed materials, such as the chart which federal law used to require as part of the patient package insert for oral contraceptives, unaccompanied by discus-

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26 Many entities which receive Title X funds also operate other health care services, including abortion services. General Accounting Office, Restrictions on Abortion and Lobbying Activities in Family Planning Programs Need Clarification (September 24, 1982) (J.A. 85). *See* discussion *infra* page 29.

sion, explication or counseling. *Id.* at § 59.8(b)(6).[27] This provision of the regulations, moreover, leaves no room at all for warning a woman that if she becomes pregnant with an IUD in place, she should be prepared to consider an abortion, a warning required elsewhere under federal law and one which may save her life. *See* 21 C.F.R. § 310.502 (1989).

The ban on counseling and referral applies to private as well as public funds within the Title X project. For example, patients who pay full fee for their services may not receive the prohibited information, and privately raised "matching funds" may not be used to provide the prohibited services. 42 C.F.R. § 59.2.

Moreover, neutral educational and informational materials regarding abortion may no longer be supplied through a Title X project, including its libraries, because such materials are now viewed as "encouraging or promoting abortion." *Id.* at § 59.10 (a)(5).

Effect of the New Regulations

The new regulations' prohibition on the utterance of information about abortion effectively deprives women of information they need to make critical health care decisions. It is unlikely that women will simply go elsewhere for this information. Congress created the Title X program in recognition of the fact that it would provide poor people access to services available to them nowhere else. Even if it were easy for women who know they want abortions to find alternative sources of information, the regulations apply in situations where women will not be able to perceive their own needs. For example, women with health threatening pregnancies confronted with their physicians' silence have no way of knowing other services should be searched out. The result can only be increasingly complicated pregnancies and poor maternal and fetal health.[28]

27 This patient package insert for oral contraceptives used to be required to contain a chart comparing the risks of barrier methods backed up with early abortion to the risks of the Pill. 42 Fed. Reg. 4214 *et seq.* (1978). The FDA dropped the requirement that this information be included in the patient package insert in February, 1988.

28 Grimes declaration, ¶ 9 (A-21).

The situation is worsened by the addition of propaganda: the requirement that the woman be provided with a list of providers of prenatal care. It is unlikely that a woman seeking an abortion will get the information or services she needs from any provider on the list. Worse still, the provision of the list to her will be affirmatively misleading, encouraging her to embark on a confusing and fruitless search, one which could seriously endanger her health.

Providers of abortion services poor women can afford are not likely to be on the list. This is because most abortions and nearly all moderately priced services are provided at clinics which would be excluded from the list because they specialize in abortion services or do not provide prenatal care.[29] Hospitals as providers of abortion services have become increasingly scarce.[30] Those that do exist tend to provide abortions at prices beyond the reach of most Title X patients[31] and under restricted circumstances: for example, only in cases of fetal abnormality or when there is a threat to the woman's life.[32]

Nor is it likely women will obtain adequate or timely informational services from the agencies on the list. Prenatal care clinics assume their clients have wanted pregnancies and, consequently, are not set up to offer counseling or referral for

29 Henshaw declaration, ¶ 12 (J.A. 192). For example, virtually all abortions in the State of Utah are performed in two specialized abortion clinics which would be disqualified from the list. Second Galloway declaration, ¶ 3 (A-16-A-17). In Colorado 78.7% of all abortions are performed at eight specialized clinics ineligible to appear on the list. Second Clark declaration, ¶ 2 (A-2). *See generally*, Henshaw and Van Vort, *Abortion Services in the United States, 1987 and 1988*, 22 Family Planning Perspectives 102 (1990) (increasingly high percentage of the nation's abortions are performed in specialized abortion clinics).

30 *Abortion Services in the United States*, *supra* note 29 at 107 (number of hospital providers dropped from 1,654 in 1977 to 1,040 in 1988).

31 A hospital abortion, even one performed on an outpatient basis, costs three to four times as much as an abortion in a free-standing clinic. Henshaw, *Freestanding Abortion Clinics: Services, Structure, Fees*, 14 Family Planning Perspectives 248, 255 (1982).

32 *See, e.g.*, Second Galloway declaration, ¶ 3 (A-16-A-17).

other options.[33] In fact, many refer to Title X clinics for pregnancy counseling.[34] Because low cost prenatal care services are scarce, there may be a wait as long as ten weeks for a first appointment.[35] Moreover, the regulations provide that social service agencies which promote the welfare of unborn children but provide no abortions be placed on the list; this virtually insures the inclusion of so-called "right to life" problem pregnancy centers whose stated mission is to steer women away from abortion.[36]

Even if the list included a provider that would provide prompt information, the woman has no way of obtaining that information in an efficient manner. Title X personnel are forbidden to identify those organizations on the list that provide abortion information, tell a woman whom to speak to at an organization to obtain help with abortion, or otherwise how to go about getting the advice she needs. Moreover, even if the agency which operates the Title X project also operates a totally separate informational service with private funds, Title X project personnel may not tell the woman about the existence of that service.

The result of the provision of this confusing and irrelevant information is that, at the least, women will be delayed in obtaining the health care they want and need.[37] Even for healthy women, delay in obtaining an abortion leads to increased health risks.[38] For women whose health is adversely affected by continued pregnancy, the delay can mean serious health damage, even death.[39]

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33 *See, e.g.*, Second Clark declaration, ¶ 7 (A-7); Second Galloway declaration, ¶¶ 5,6,7 (A-17-A-18); Second Durgin declaration, ¶ 4 (A-9).

34 *See, e.g.*, Second Durgin Declaration, ¶ 4 (A-9).

35 Second Clark declaration, ¶ 8 (A-7); Second Durgin declaration, ¶ 5 (A-10) (wait of three weeks for counseling appointment with health department or community clinic).

36 *See, e.g.*, Second Clark declaration, ¶¶ 11, 12 (A-7).

37 *See, e.g.*, Second Galloway declaration, ¶ 7 (A-18).

38 Grimes declaration, ¶ 8 (A-21).

39 *Id.*, ¶ 9 (A-21).

At the worst, a woman denied information and treated to the referral runaround will have her choice completely denied. Abortions become more expensive the later they are obtained and poor women may simply be unable to afford the increased cost that results from delay.[40] Providers willing to perform second trimester abortions are scarce[41] and after a certain point, abortions are no longer legally available.

Title X patients are particularly vulnerable to these restrictions. Because of poverty or youth[42], they already tend to delay identifying their pregnancies and seek abortions later than affluent or mature women.[43] Moreover, they are disproportionately affected by diseases such as AIDS that can complicate their health and the health of the fetus.[44] By definition, they are dependent on subsidized services for information and counseling.[45] The regulations turn a program

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40 *See, e.g.*, Second Galloway declaration, ¶ 10 (A-18-A-19). (In Utah, prices for abortions rise from $200 in the first trimester to $900 at 20-21 weeks of pregnancy.) The states generally provide no subsidies for the cost of abortion services, while childbirth is universally subsidized.

41 Henshaw, *et al.*, *Abortion Services in the United States, 1984-85*, 19 Family Planning Perspectives 63 (1987). *See, e.g.*, Second Galloway declaration, ¶¶ 3, 10 (only one clinic in the State of Utah performs second trimester abortions) (A-16-17, A-18-19).

42 Fourteen percent of Title X patients are minors. *Delivery of Family Planning Services in the United States, supra* note 7 at 92. The statute mandates "services for adolescents." 42 U.S.C. § 300(a).

43 Clark declaration, ¶ 9 (A-3); Morley declaration, ¶ 12 (J.A. 227). The majority of legal abortions performed at or after 16 weeks gestation, are performed on 15 to 19 year olds although women in this age group accounted for only 24% of all abortions. Centers for Disease Control, CDC Surveillance Summaries, June 1990. MMWR 1990; 39 (No. SS-2), p. 53, Table 19, Number and percentage of reported legal abortions, by weeks of gestation, procedure, age group, and race, 1986.

44 Morley declaration, ¶ 16 (J.A. 228); Joseph declaration, ¶¶ 6-8 (J.A. 198-99).

45 In some communities, the Title X clinic is virtually the *only* provider of subsidized care. *See, e.g.*, Clark declaration, ¶ 12 (A-3-A-4); Galloway declaration, ¶ 2-4 (A-11). Since many providers will not accept Title X funds under the unethical restrictions imposed by the regulations, they will be forced to close or drastically curtail services, depriving poor women of their

intended to aid the poor by enhancing their life choices[46] into an assault on the very people and rights it was meant to protect.

I. THE REGULATIONS' COUNSELING AND REFERRAL BAN SUPPRESSES INFORMATION AND COERCES CHOICE IN VIOLATION OF THE FIRST AMENDMENT

The new regulations' combination of censorship and propaganda effectively suppresses information in violation of Title X patients' first amendment rights. Although the government may decide what to subsidize, it may not manipulate programs like Title X so as to suppress ideas and information. The Title X regulations do this by hiding information and compelling provision of irrelevant information in a context in which individuals are particularly reliant for full information and advice: the relationship between health care professional and patient.

A. The First Amendment Protects The Right To Receive Information

As this Court has said, "Freedom of speech presupposes a willing speaker. But where a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976). This Court has also made abundantly clear that the right to receive information is not confined to political information, but includes all matters of public concern. It includes the right to receive information about prescription drugs, *Virginia Board of Pharmacy*, 425 U.S. 748; lawyers' fees, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); sale of housing, *Linmark Associates v. Willingboro*, 431 U.S. 85 (1977); contraception, *Carey v. Population Services International*, 431 U.S. 678 (1977) and *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); and abortion, *Bigelow v. Virginia*, 421 U.S. 809 (1975).

The constitutional protection for the right to receive information does not exist in a vacuum. Its purpose is to insure that individuals make critical life decisions in an informed and intelligent manner. *See Cohen v. California*, 403 U.S. 15, 24 (1971) (no other system protects the "individual dignity and choice upon which our political system rests"). When governmental restrictions block the flow of information necessary or even useful to make such decisions, the first amendment is violated.

Justice Rehnquist's concurring opinion in *Bolger v. Youngs Drug Products*, 463 U.S. 60, recognizes that the first amendment right to receive information safeguards the integrity of decisions regarding family life and reproductive health similar to those at issue here. In that case he agreed that the Postal Service's ban on contraceptive advertising was unconstitutional because it denied "parents access to information about birth control that might help them make informed decisions" in directing their children's education regarding the use of contraception. *Id.* at 79. In so doing, he noted the connection between the first amendment's protection of the free flow of information and individual autonomy:

> The First Amendment, which was designed to prevent the Government from suppressing information, requires us 'to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather then to close them.'

463 U. S. at 79 (Rehnquist J., with whom O'Connor J., joins, concurring) (quoting *Virginia Board of Pharmacy*, 425 U.S. at 770). *See also Cruzan v. Director, Missouri Department of Health*, No. 88-1503, 58 U.S. Law Week 4916 (June 26, 1990) (recognizing an individual's liberty interest in informed consent).

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sole source of family planning services. Clark declaration, ¶ 12 (A-3-A-4); Galloway declaration, ¶¶ 7,8 (A-12); Vernon declaration, ¶¶ 14,15 (A-28-A-29).

46 *See, e.g.*, Senate Report No. 91-1004, 91st Cong., 2d Sess. 12 (1970) (Title X addresses the need of the poor to exercise their right to determine the size and spacing of their families.)

The Title X regulations strike at the heart of these first amendment principles. Rather than treating women like the parents in *Bolger*—free agents who must be permitted to perceive their own best interests on the basis of full information—they manipulate the provision of information so as to distort perception and remove choice. They do this by censoring truthful information about abortion and compelling provision of what for some women is irrelevant information about prenatal care, so that women are delayed or blocked in their ability to resolve a problem pregnancy. Such a system could not be more adverse to the first amendment. *Central Hudson Gas and Electric v. Public Service Commission*, 447 U.S. 557, 574-75 (1980) (Brennan, J., concurring) (state's attempt to manipulate its citizens' choices by withholding information strikes at the "heart" of the first amendment). *Linmark Associates v. Willingboro*, 431 U.S. at 96 (government may not withhold information in order to influence a person's decision about where to live).

B. The Government May Not Manipulate Subsidy Programs So As To Have A Significantly Coercive Effect On The Receipt Of Information

Although the regulations impose restrictions in the context of a program of government subsidies, the first amendment violation is not diminished. Although the government may decide how to spend its money, it may not manipulate its subsidy programs so as to have a "significant coercive effect" on the exercise of first amendment rights. *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., with whom the Chief Justice joins, dissenting).[47]

In determining whether restrictions in a government subsidy program have a "significant coercive effect" on constitutional rights, this Court has utilized both a formal legal and a practical analysis. The formal legal analysis looks to whether the restrictions affirmatively block the exercise of rights or, instead, merely leave in place an impediment to their exercise, such as poverty, which the government did not create. In other words, does the funding restriction leave a person in the same position he or she would be in if there were no subsidy program at all? For example, in *Lyng v. International Union, U.A.W.*, 485 U.S. 360 (1988), this Court said denial of food stamps to strikers did not interfere with the strikers' first amendment right to associate. The denial simply failed to alleviate the inevitable economic hardship that comes with striking. Strikers were certainly not affirmatively harmed by the very existence of the food stamp program. *See also Taxation With Representation*, 461 U.S. 540 (failure to grant a tax exemption for lobbying does not impede an organization's right to lobby); *Harris v. McRae*, 448 U.S. 297 (1980) (by refusing to fund abortions, government simply fails to alleviate the hardships of poverty; it leaves women free to choose whether or not to have an abortion with their own funds).

The existence of a more factually based, practical analysis has been implied in a number of cases. In *Lyng*, the Court said the denial of food stamp benefits was "exceedingly unlikely" to prevent individuals from continuing to associate together in unions. 485 U.S. at 366 (quoting *Lyng v. Castilla*, 477 U.S. 635 (1986)). Similarly, In *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987), Justice Scalia noted in his dissenting opinion that it was "implausible" that Arkansas' failure to exempt certain publications from a 4% general sales tax was either meant to inhibit or had the effect of inhibiting those publications. *Id.* at 237 (Scalia. J, dissenting). And in *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), this Court upheld a denial of tax exemption for a charity's lobbying activities because the organization was free to lobby through a wholly controlled ancillary corporation. *Id.* at 544 n.6. *See also FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984) (statute would be valid that banned public radio stations from editorializing but allowed

47 This Court's opinions indicate that subsidy restrictions "aimed at the suppression of dangerous ideas" are invalid on their face without reference to their coercive impact. *Regan v. Taxation with Representation*, 461 U.S. 540, 550 (1983); *FCC v. League of Women Voters*, 468 U.S. 364, 407 (1984) (Rehnquist, J., dissenting). Although *amici* believe that that test applies to the speech at issue here, they believe the regulations fall under the more stringent test of "significant coercive effect" as well and address their brief to that issue.

establishment of a privately funded affiliate which could editorialize while sharing the public station's facilities).

C. The Regulations Have A Significant Coercive Impact On The Right To Receive Information

Applying these tests, the Title X regulations are unconstitutional. Denial of information about abortion and compelled receipt of information about prenatal care does not leave women in the same position they would be if there were no Title X program at all. Rather, by accepting the government's offer of aid, they are affirmatively harmed. Moreover, as a practical matter it is "exceedingly unlikely" that Title X patients will, as a result of the regulations' manipulative provision of information, be able to obtain the information they need to protect their health and life choices. *Cf. Lyng*, 485 U.S. at 366.

The coercive effect of the regulations arises in part out of the design and purpose of the Title X program. Title X is an aggressive program of government outreach and support for expanded family planning services.[48] Throughout the program's history Congress and DHHS have set goals for pre-

48 Title X has been described as a "major new congressional initiative in the field of population research and family planning" with a goal to "*expand the availability* of voluntary family planning services with priority on low income people." House Report No. 95-1191, 95th Cong., 2d. Sess. 28 (1978) (emphasis added). The statute itself requires that each fiscal year the Secretary make a report to Congress on a plan for *extension of family planning services to all persons desiring such services*. 42 U.S.C. 300a-6a (a)(1) (emphasis added). All projects participating in the Title X program must provide assurances to the Secretary that they will develop informational and educational programs designed to (i) achieve community understanding of the objectives of the Title X program, (ii) inform the community of the availability of services, and (iii) promote continued participation in the Title X project by persons to whom family planning services may be beneficial. 42 C.F.R. § 59.5 (b)(3). The Department's Program Guidelines, *supra* note 12, at § 6.11 require that all projects "establish and implement planned activities whereby their services are made known to the community" in order to promote "community acceptance of and access to family planning services."

vention of unintended pregnancy[49] and Congress has taken pride year after year in the increasing number of persons reached with the services.[50] The government reached out to poor women with an irresistible invitation: "If you are unable to afford, or are scrimping to pay for family planning services, or buying over-the-counter products with no medical back up, come to our clinics where you will receive medically complete comprehensive services."

But, unlike the strikers in *Lyng*, left in the same position by their exclusion from the food stamp program as they would have been if there were no program at all, women heeding the siren call of the Title X program will be affirmatively harmed by their acceptance of government aid. A woman is worse off in the clutches of the "new" Title X program than she would be if she ignored or never heard the government's offer, and sacrificed to pay for her own medical care or got no medical family planning care at all.[51]

Had a Title X patient ignored the government's invitation and scraped together the funds to pay a private doctor for family planning services and been diagnosed as pregnant[52],

49 The Secretary's five year plan for family planning services must include on a phased basis, "the number of individuals to be served by family planning programs under this subchapter" and the Secretary's progress in meeting the goals of the previous year. 42 U.S.C. § 300a-6a (b)(1) and (c)(1).

50 For example, the House Committee on Interstate and Foreign Commerce's report on reauthorization of Title X cited the program's "impressive achievement" of reaching 4 million low- and marginal-income women, including 1.2 million teenagers, but nevertheless estimated that an additional three million women and two million sexually active teenagers needed services. It therefore authorized an increase in appropriations to "reaffirm its commitment to a nationwide, *targeted* family planning services program." House Report No. 95-1191, 95th Cong., 2d Sess. 29, 31 (1978) (emphasis added).

51 Moreover, once a poor woman whose marginal income makes her ineligible for free services has spent her scarce resources on the inadequate care which will be provided at Title X clinics, she may be unable to find additional funds for private care. *Commonwealth of Massachusetts v. Bowen*, 899 F.2d 53, 70 (1st Cir. 1990). *See supra* note 8.

52 The government says that the Title X regulations are simply denying a subsidy for the "service" of abortion counseling and referral. As

she would have received, consistent with her doctor's legal and ethical obligations, information about all options for managing her pregnancy, and referral upon request for an abortion, even if the physician did not provide it.[53] Moreover, if in the course of examining the patient, a medical problem was identified that made abortion an alternative the woman should consider, the physician would have discussed that.[54] A woman accepting the government's offer of help is, without warning[55], denied this critical information.

Moreover, even if the woman had gotten no family planning care at all and experienced an unplanned pregnancy, she would be in a better position to ascertain her medical status and/or find an abortion provider. "Unassisted" by the Title X program, she would not be confronted with a confusing list of prenatal care providers through which she would pursue a frustrating and fruitless search for the services she needed. *See* Statement of Facts, *supra* pp. 11-12.

Most poignantly, a woman with a medically complicated pregnancy who at the beginning of that pregnancy got no care or treatment would be *more likely* to seek out medical care if symptoms later arose, than had she received the biased consultation mandated by the Title X regulations which would have hidden from her the severity of the problems and the need to seek help.

The coerciveness of this scheme arises out of the fact that it is imposed within a relationship which persons rely on for and in which they expect complete and unbiased advice and information, rendered in their best interest: the relationship

explained in the Statement of Facts, *supra*, this is not a separate service but an integral part of a family planning program.

53 Morley declaration, ¶ 19 (J.A. 229-30); Sammons affidavit, ¶ 15 (J.A. 267).

54 Morley declaration, ¶ 17 (J.A. 228-29); Sammons affidavit, ¶¶ 10, 11, 12, 15 (J.A. 267).

55 No posted disclaimer could adequately warn a woman of the information she will *not* receive. *See infra* p. 21.

between health practitioner and patient.[56] The regulations betray this trust because there is no meaningful disclaimer that could adequately warn women of the perils they are about to encounter. Even a sign in the clinic saying "abortion not discussed here" would be meaningless to a patient who needs an abortion for health reasons because she has no way of knowing that abortion is an option she should consider. Similarly, a woman not warned to consider abortion if she suspects pregnancy with an IUD in place will have no clue that such a sign applies to her.

By, without warning, censoring information expected in a health care relationship and compelling the receipt of irrelevant, inappropriate information, the Title X regulations leave women worse off than they would be if they had never entered the door of a Title X clinic. Their right to receive the information necessary to make critical life choices has been affirmatively and effectively suppressed.

Much of the preceding discussion applies to any "practical" test for the coercive impact of subsidy denials. Unlike the strikers in *Lyng* who were not likely to give up striking solely because of a denial of food stamps, it is "exceedingly unlikely" that women subjected to the Title X regulations will find the information they need. As a practical matter, the agencies on the referral list are not set up to provide the options counseling formerly provided in Title X clinics. *See* Statement of Facts, *supra* pp. 11-12. Even were they to change operations, there is no way under the regulations for Title X personnel to direct the women to the agencies that will give them appropriate information, even to those services run with private funds by the Title X project's parent agency. Finally, Title X patients are uniquely vulnerable to the denial of information because they are by definition dependent on

56 In this sense the Title X regulations must be distinguished from the situation where the government decides to fund speeches at the Kennedy Center on music but not on politics, *see* 20 U.S.C. § 76n(a) (cited in *Arkansas Writers' Project*, 481 U.S. at 238 (Scalia, J., dissenting)), or billboards expressing government viewpoints. Listeners to those types of speech understand them as biased and expect to be and are free to seek out other viewpoints. Moreover, they are not dependent on the information they receive to make critical life decisions.

the Title X program for family planning care, and disproportionately suffer from pregnancy complications and delay in obtaining help with their pregnancies. *See* Statement of Facts *supra* p. 13.

Both as a formal legal and a practical matter the regulations have a significant coercive effect on the right to receive information and must be held unconstitutional.

II. THE REGULATIONS VIOLATE THE RIGHT TO PRIVACY

Because they impermissibly restrict the flow of information that a woman must have to make an informed decision whether to have an abortion, the regulations "constitute an 'unduly burdensome interference' with a woman's freedom to decide whether to terminate her pregnancy," and therefore violate the right to privacy. *Planned Parenthood Federation of America v. Bowen*, 680 F. Supp. at 1474 (quoting *Maher v. Roe*, 432 U.S. 464, 473-74 (1977)). *Accord Commonwealth of Massachusetts v. Bowen*, 899 F.2d at 65.

The government has claimed throughout this litigation, and in other identical cases, that *Maher v. Roe*, 432 U.S. 464 and *Harris v. McRae*, 448 U.S. 297 authorize the regulations. In *Maher* and *Harris* this Court approved governmental decisions not to pay for poor women's abortions because such a denial imposed no affirmative obstacle in the path of a woman needing an abortion; it simply failed to remove one not of the government's creation: the woman's poverty. As described in Point I, however, these regulations do much more than passively fail to alleviate the disabilities of poverty; they affirmatively and aggressively interfere with choice. The Medicaid program of government aid for health care dealt with in *Maher* and *Harris* did not harm pregnant women. That subsidy denial left them with the same range of choices in deciding whether to have an abortion that they would have had if the government never set up the Medicaid program. *Harris*, 448 U.S. at 317. In contrast, a pregnant woman who enters the doors of a Title X clinic is worse off for having accepted the government's help. She will be delayed in getting the health care she needs and her right to

that care may be altogether lost. The regulations, therefore, violate the right to privacy.

III. THE REGULATIONS ARE NOT RATIONALLY RELATED TO ANY LEGITIMATE GOVERNMENT PURPOSE

Obstacles to the effectuation of fundamental rights, such as the first amendment and privacy rights at issue here, must be subjected to strict scrutiny and justified by a compelling state interest. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (right to privacy); *Boos v. Barry*, 485 U.S. 312 (1988) (content based speech restrictions). There is no need to apply that judicial test here, however, as the regulations do not meet the most minimal level of judicial scrutiny: that they be rationally related to a legitimate government end. *Hodgson v. Minnesota*, Nos. 88-1125 and 88-1309, slip op., 58 U.S.L.W. 4957, 4968 (June 26, 1990) (O'Connor, J., concurring). Whatever the purpose of these regulations—whether it is to dissuade women from having abortions or not to "promote or encourage abortion" in the Title X program—the censorship and propaganda of the regulations cannot be a rational means to that end. If the "rational basis" test means anything, it must be that government may not accomplish its ends by suppressing information[57], for to do so strikes at the heart of our status as a free people. The choice "between the dangers of suppressing information, and the dangers of its misuse if it is freely available" is not a choice the government may make, for it is a choice "that the First Amendment makes for us." *Linmark Associates*, 431 U.S. at 97 (quoting *Virginia Board of Pharmacy*, 425 U.S. at 770). No other system protects the "individual dignity and choice" upon which our democracy rests. *See Cohen v. California*, 403 U.S. 15, 24 (1971).

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57 *But c.f. Near v. Minnesota*, 283 U. S. 697, 715-16 (1931) (information may be suppressed in time of war or national emergency). The Secretary has cited no evidence to indicate that counseling or referral services under present Title X policies are being abused so as to promote or encourage abortions or advocate abortion. In fact, the report of the General Accounting Office's extensive audit of Title X program exonerated Title X clinics of any such charge. Restrictions on Abortion, *supra* note 26 (J.A. 86).

IV. THE NEW REGULATIONS VIOLATE THE TITLE X STATUTE

The new regulations are clearly inconsistent with two statutory mandates.[58] They contain a brand new definition of "Title X project funds" to "include all funds allocated to the Title X program, including but not limited to grant funds, grant-related income or matching funds." 42 C.F.R. § 59.2. This definition extends the statutory abortion prohibition, 42 U.S.C. § 300a-6, beyond the limits intended by Congress.

The second mandate arises through consistent and emphatic legislative history, expressing Congress' intent that a Title X program be closely coordinated with other health services and, if possible, fully integrated into larger comprehensive health care programs, including those run by the same organization which receives Title X funds. The purpose of this mandate is to provide an efficient program that acts as an entry point into the primary health care system for poor women. This mandate is violated by the referral prohibitions of 42 C.F.R. § 59.8 and the separation requirements of § 59.9.

A. The Definition Of Title X Project Funds Violates The Statute

Section 300a-6 states that none of "the funds appropriated" under Title X may "be used in programs where abortion is a method of family planning". Congress made clear, however, that prohibition was not to extend beyond the Title X program.

> [Section 300a-6] does not and is not intended to interfere with or limit *programs* conducted in accordance with State or local laws and regulations which are supported by funds other than those authorized under this legislation.

Conference Report No. 91-1667, 91st Cong., 2d Sess. 8 (1970) (emphasis added).

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58 *Amici* fully agree with the other statutory arguments made by the plaintiffs/appellants in this case.

The exact parameters of each grantee's Title X program or project are set by statute. A Title X "program" consists of federally appropriated Title X funds which may be no less than 90 percent (90%) of the program's budget[59] and a ten percent (10%) "match" supplied by the recipient. 42 U.S.C. § 300a-4(a). Any funds raised by the recipient exceeding this 10% match are, therefore, outside the scope of the "program".

The new regulations contravene this statutory requirement. They define a Title X project to include Title X appropriated funds, the recipient's ten percent (10%) share, and virtually all other grant-related and program income received by a Title X grantee, including patient fees, reimbursement through third parties such as Medicaid, etc. 42 C.F.R. § 59.2. The regulations therefore, extend the prohibitions of 42 U.S.C. § 300a-6 beyond the Title X program as Congress has precisely defined it to other revenue associated with family planning activities conducted by a recipient. This violates Congress' intent that the abortion prohibition be confined to the limits of the Title X program.[60]

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59 This requirement of a minimum federal contribution is unique among federal grant statutes, which usually place the burden on the recipient to match the federal share. In contrast, under Title X, the burden is on the government to provide a minimum percentage of the costs of a program. *See, e.g.*, Medicaid, 42 U.S.C. § 1396 *et seq.*; the Adolescent Family Life Demonstration Projects, 42 U.S.C. § 300z *et seq.*; and NIH alcohol and drug abuse research grants, 42 U.S.C. § 290bb *et seq.*

The government however rarely meets this obligation. In oral argument before the U.S. Court of Appeals for the First Circuit in *Commonwealth of Mass. v. Secretary of Health & Hum. Serv.*, 899 F.2d 53, counsel for the Secretary indicated that Title X recipients generally supplied fifty percent (50%) of the total funds associated with their family planning costs—considerably more than is required by the statute. 899 F.2d at 73 n.11. Affidavits in the case before this court provide confirmation. *See, e.g.*, Affidavit of Joan Coombs (J.A. 141) (Planned Parenthood of New York City, Inc. receives approximately 27% of its operating budget for its clinic at the HUB, its center in the South Bronx, from Title X appropriated dollars); Affidavit of Kathleen Murray (J.A. 239) (Deaconess Family Planning Program's Title X funding would total 34% of the program's budget).

60 In so far as the statute does impose the abortion prohibition on the recipient's private funds within the 10% match, the statute itself may be unconstitutional. *Commonwealth of Mass.*, 899 F.2d at 74.

B. The New Regulations Violate Congress' Intent That Title X Projects Be Coordinated And Integrated With Other Health Care Programs

The new regulations prohibit a health care professional from freely providing referral to a pregnant patient based on her medical needs and wishes. 42 C.F.R. § 59.8. In addition, § 59.9 requires not only financial but also physical separation of activities allowed from those prohibited under the new regulations. These requirements violate Congressional intent that Title X programs be coordinated with other health care programs and, where possible, integrated with general health care programs.

The importance of comprehensive services, integrated into a total health care program, was recognized by Congress from the beginning of the Title X program. At the time of Title X's original enactment, the Senate Committee on Labor and Public Welfare stated that it did not view "family planning as merely a euphemism for birth control. It is properly a part of comprehensive health care and should consist of much more than the dispensation of contraceptive devices." S. Rep. No. 91-1004, 91st Cong., 2d Sess. 10 (1970). According to the Committee, the Title X program should include:

> Medical services, including consultation, examination, prescription and continuing supervision, supplies, instruction and *referral to other medical services as needed* . . . [an] outreach/follow-up system, including patient identification, contact, recruitment, appointment support, follow-up, and continuing education.

Id. (Emphasis added). The House-Senate Conference Report reflected this concern in stating that Title X's abortion prohibition was "not intended to interfere with or limit programs" supported with non-Title X funds. Conf. Rep. No. 91-1667, 91st Cong., 2d Sess. 5082.

Soon after Title X was enacted, DHHS explained the reason for these requirements of referral and coordination:

> While the program cannot provide full medical care because of its specialized nature, services should be provided for the screening and referral, including follow-up,

> of the patient to appropriate physicians, hospitals or other programs for necessary treatment. *This mechanism is vital, given the fact that family planning is often the point of entry into a fragmented health care system for many individuals*[61] (emphasis added).

By 1975, Congress' concerns had broadened to include integration of family planning programs into general health care programs. Title X had, by that time, become *the* federal family planning program, having absorbed other related federal programs. The report of the Senate Labor and Public Welfare Committee for the 1975 reauthorization states that:

> The Committee believes that comprehensive health care programs, particularly those concerned with maternal health, should include family planning in the services they routinely provide, and stresses that it is essential that there be close coordination and, *whenever possible, integration of family planning services into all general health care programs.* In addition, the Committee believes that family planning services under Title X generally are most effectively provided in a general health setting and thus encourages coordination and integration into all programs offering general health care.

S. Rep. No. 94-29, 94 Cong., 1st Sess. 54, *reprinted in* 1975 U.S. Code Cong. and Ad. News 517 (emphasis added). Thus, Congress made clear that Title X programs were not merely to be coordinated with, *but integrated into*, such programs as Medicaid (42 U.S.C. § 1901 *et seq.*), Maternal and Child Health (42 U.S.C. § 701 *et seq.*), and community health (42 U.S.C. § 254c *et seq.*). *See also* S. Rep. No. 95-102, 95th Cong., 1st Sess. 26 (1977).

These coordination and integration requirements are completely eviscerated by the referral prohibitions of § 59.8(a)(2)

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61 Report of the Secretary of Health, Education and Welfare Submitting Five Year Plan for Family Planning Services and Population Research Program, Special Subcommittee on Human Resources, Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess. 318 (Comm. Print October 1971) (J.A. 41). The same report included abortion referral "where appropriate" as a "Preferred Standard of Medical Care." *Id.* at 329, 333.

as well as the physical and financial separation requirements of § 59.9.

The referral prohibitions violate both the coordination and integration requirements. The Title X recipient's inability to refer a pregnant patient for appropriate care violates the Congressional intent that the Title X program be coordinated with other providers, in recognition of the fact that the utilization of family planning services is often an entry point into a fragmented health care system for poor women. The Title X provider's inability to refer to its own privately funded counseling service violates the mandate that Title X projects be integrated into existing health care programs. Rather than fostering such integration, the regulations require that Title X personnel merely provide the client with a list of providers who "promote the welfare of mother and unborn child" and send her from the recipient's offices with that list in hand. At best, the recipient's separate counseling service[62] would be one of numerous other providers on the list, and the client's use of that service would occur by mere statistical happenstance.[63]

The physical and financial separation requirements also make it clear that a recipient's options counseling service would have to be a completely independent one from family planning activity. Such an obviously expensive undertaking is rendered impracticable in the first instance, since much of the recipient's private income from fees and grants is appropriated by the new definition of grant-related income.[64] 42

62 This argument assumes the recipient could find funds to pay for such counseling. This is problematic because the new regulations greatly expand the definition of funds subject to the abortion prohibition. *See supra* pp. 24-25.

63 The appearance of an options counseling service on the list is itself problematic, since such a service might not, under the new regulations, be one which "promotes the welfare of mother and unborn child." 42 C.F.R. § 59.8(a)(2).

64 Most recipients use Title X dollars in an overall family planning program. In those situations, the new definition of "Title X program" appears

C.F.R. § 59.2. Similarly, the separation requirements completely undermine coordination and integration by indicating that an entirely discrete system of records and separate personnel will be necessary for the counseling service to fulfill the requirements of § 59.9.

The practical effects of the new regulations must be understood in light of the nature of the recipients of Title X funds. Of 3,900 clinics nationwide that provide Title X services, approximately 1700 are part of county health departments.[65] A smaller percentage are community health centers, receiving additional federal funds under Section 330 of the Public Health Service Act. These entities provide a range of outpatient services to the same population targeted by the Title X program. To provide this broad range of services, they use the same staff, under one roof, with one central record system. If a woman goes into a health center or health department for medical services, and some problem or condition is detected, treatment can be provided within the same facility. These entities typically provide a range of health services for women, including prenatal and maternal services. The new regulations make their functioning impossible, contrary to express congressional intent.

In addition, the record below, like the record considered by the First Circuit in *Commonwealth of Massachusetts*, 899 F.2d 53, shows that most clinics (whether they are free-standing, hospital-based, part of a county health department, or otherwise) lack the resources to locate, furnish, and operate a separate facility in which to provide the services unallowable in a facility receiving Title X funds. Nor can such a facility be sustained with the ongoing costs of duplicative staff, administration, and maintenance costs. As the court stated in *Commonwealth of Massachusetts*, 899 F.2d at 74, "[t]he practical effect of the regulations is to restrict signifi-

to encompass all of the fees and grants coming into those recipients' family planning programs. *See supra* note 59.

65 *Family Planning Grantees, Delegates, and Clinics, 1987/1988 Directory*, Family Life Information Exchange under contract with the U.S. Department of Health and Human Services, Office of Population Affairs.

cantly the ability of the recipient organization to engage in the forbidden counseling, even on its own time with its own money."[66]

Such a situation, of course, stands in sharp contrast to the coordination and integration mandates of the Title X statute. Being able to coordinate would naturally include being able to advise the client of her medical condition, discuss other resources in the community, and make an appropriate referral. Integration would, in addition, include the ability of the Title X recipient organization to operate other health care programs in the same location with the same physicians, records, accounting systems and the like. Because the combination of the referral prohibition and the separation requirements completely undermine Congress' goal of integration and coordination, the regulations must be held in excess of statutory authority.

CONCLUSION

For all the foregoing reasons the judgment of the Court of Appeals should be reversed.

66 The onerous separation requirements of § 59.9 are unnecessary. Systems for proper allocation of a grantee's or government contractor's costs are well established. In the Title X context, they ensure that a Title X recipient will allocate its various expenditures for family planning services to accounts related to its different sources of revenue (*i.e.*, Title X, Medicaid, Maternal and Child Health, state funding, private fees). *See, e.g.*, OMB Circular A-87, Attachment A, § F-§ J; OMB Circular A-122, Attachment A, § C-§ E; 45 C.F.R. Part 95, Subpart E. These allocation methods entail more than mere bookkeeping entries in financial records. Rather, they are overall systems of financial management and control, carefully drawn and developed. The methods of cost allocation are based on documentation of time spent on different projects, overhead costs, etc. The end result of these analyses are "cost allocation plans" or "indirect cost rates" that ensure that costs are allocated fairly and properly.

Respectfully submitted,

Dara Klassel
(*Counsel of Record*)
Eve W. Paul
Barbara E. Otten
PLANNED PARENTHOOD FEDERATION
OF AMERICA
810 Seventh Avenue
New York, New York 10019
(212) 541-7800

James L. Feldesman
Susan D. Lauscher
FELDESMAN, TUCKER, LEIFER, FIDELL
AND BANK
2001 L Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 466-8960

Attorneys for Amici Curiae

Dated: July 27, 1990

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 88 W 158

PLANNED PARENTHOOD FEDERATION OF AMERICA, et al.,
Plaintiffs,

vs.

OTIS BOWEN, M.D.,
Defendant.

DECLARATION

SYLVIA CLARK, declares under penalty of perjury that the following is true and correct:

1. I am the Executive Director of plaintiff Planned Parenthood of the Rocky Mountains ("PPRM"); and I am a nurse practitioner and a certified nurse-midwife. I submit this Declaration to support plaintiffs' motion for a preliminary injunction.

2. PPRM operates 12 clinics that are supported by Title X funds, and also provides reimbursement with Title X funds to one physician, plaintiff Freedman, who provides services at his office to eligible patients from his community. These clinics and that office serve about 13,000 patients each year. About 90% of these patients receive their services on a subsidized basis pursuant to a sliding fee scale. The remainder pay the full cost for their services because their income exceeds the maximum (200% of the federal poverty level) eligible for some subsidy.

3. If the regulations that are at issue in this litigation take effect, PPRM will be forced either to impose government-mandated censorship on its physicians and medical staff in its Title X clinics, and thereby treat those patients in an unethi-

cal and medically dangerous way; or to discontinue its Title X program.

4. The regulations forbid our physicians and the medical staff under their supervision in the Title X-funded clinics from providing information relating to abortion to patients regardless of the medical or professional obligation that may exist in any particular case to do so. This will affect two areas of our practice.

5. The first is pregnancy counseling. Many women, upon learning that they are pregnant, request counseling about their options for managing a problem pregnancy. This counseling may be necessary because of a medical condition that endangers either the woman or the fetus, because the pregnancy is the result of a sexual assault, or because the pregnancy will pose unmanageable burdens for the woman or her family.

6. PPRM's present practice, which is consistent with all commonly accepted standards of medical practice, is to provide women who seek such counseling with neutral and objective information about all of their options, including abortion; and then to provide appropriate referrals depending on the woman's decision after the counseling.

7. My understanding of the present regulations is that they forbid the provision of any information about abortion. They require, instead, that the woman, regardless of her medical condition (unless it is an emergency) or her wishes, be given a referral list of prenatal or social service providers who promote the welfare of mothers and unborn children.

8. These requirements will leave PPRM's patients uninformed about their options, regardless of their medical conditions, their personal wishes, and the consequences that could flow from an uninformed choice. Moreover, PPRM will be forced to provide them with referrals that will often not be consistent with their needs, but will also often affirmatively point them in the wrong direction.

9. Even women who ultimately choose to obtain an abortion and are able to locate a provider will be imperiled. The medical risk of an abortion increases as the pregnancy progresses and, at a certain stage of the pregnancy, abortion ceases to be available. PPRM patients will be delayed because of the lack of information made available to them at the earliest moment. This problem is compounded by the fact that poor women tend to seek pregnancy tests later than other women. Thus, many PPRM patients will be forced to undergo riskier abortions, while others will forfeit that option altogether because they will not be able to locate a provider before it is too late in the pregnancy for an abortion.

10. The second area is family planning counseling. All women who come to PPRM for contraceptive services receive a medical examination, the information necessary to make an informed choice about method of contraception and, should they choose it, counseling about their choice. For many women, for reasons related to such variables as age, other medical conditions, or whether they smoke cigarettes, the most effective method (*i.e.*, the pill) may also pose health dangers that are minimized by an alternative method (*e.g.*, a diaphragm) that is less effective. In comparing the risks, the risk (which is generally low) associated with abortion, which is available as a backup for contraceptive failure, is relevant. Therefore, PPRM provides counseling about this information in appropriate circumstances. PPRM also provides, as mandated by the Food and Drug Administration ("FDA"), counseling and information about the possibility of abortion being advisable for women who become pregnant with an intrauterine device ("IUD") in place.

11. I understand that the regulations forbid any counseling with respect to abortion in these circumstances. This censorship will cause many women to make unguided, inappropriate, and health endangering contraceptive choices due to lack of information.

12. In the communities where PPRM is forced to close its Title X clinics, subsidized reproductive health services will in

some instances no longer be available, and in the remaining communities, be drastically reduced. This means that a large number of the women who receive subsidized services at PPRM's clinics will no longer be able to receive this medical care, or will only be able to receive it by traveling to another community where it may be offered.

13. These women are, by definition, poor. Travel for them is, therefore, difficult or unlikely, and thus the clinic closings will amount to a large-scale cutoff of medical care.

14. Even our patients for whom services at Title X clinics are not subsidized will be injured by the loss of continuity of care and the need to locate satisfactory services elsewhere.

15. The regulations threaten injury to PPRM in another way. They impose a requirement of "program integrity" upon grantees that "encourage, promote, or advocate" abortion as a method of family planning. I understand that this requirement will apply to the dissemination of neutral and objective information about abortion (such as in educational programs) as well as to advocacy activities to protect the right to abortion, but that it will not apply to activities opposed to abortion. Moreover, I understand that the regulation does not establish clear and objective standards for meeting the "program integrity" requirement, nor does it establish a procedure by which grantees will be evaluated on this issue.

16. PPRM's 14 non-subsidized clinics provide neutral and objective information about abortion.

17. Three of those clinics also provide abortions; one provides infertility services; and one provides expanded counseling services.

18. Plaintiff Freedman, who provides services to Title X patients for PPRM at his private office, also provides abortions and counseling about abortion to his private patients in the same office.

19. PPRM's headquarters house a laboratory, education, administrative, and executive offices that support all PPRM programs. It also houses a fund raising department and a public affairs department.

20. PPRM maintains an accounting system that assures that Title X and OFP funds support only the subsidized clinics and the eligible clients served by plaintiff Freedman. PPRM has always maintained "program integrity" to the satisfaction of defendant's predecessors.

21. Now PPRM is apparently to be subjected to an unspecified review on this issue, subject to standards that are not established beforehand; and if PPRM were neither disseminating objective information about abortion, nor engaging in advocacy to protect the right to abortion, then apparently it would not be subject to the "program integrity" requirements at all.

DATED: Denver, Colorado
February 4, 1988

/s/ Sylvia Clark
SYLVIA CLARK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 88 W 158

PLANNED PARENTHOOD FEDERATION OF AMERICA, et al.,
Plaintiffs,

vs.

OTIS BOWEN, M.D.,
Defendant.

SECOND DECLARATION OF SYLVIA CLARK

SYLVIA CLARK, declares under penalty of perjury that the following is true and correct:

1. I am the Executive Director of plaintiff Planned Parenthood of the Rocky Mountains ("PPRM"). I submit this Second Declaration to support plaintiffs' motion for summary judgment.

2. In Colorado, 78.7% of all abortions are performed at eight abortion clinics located in five communities. Three of these clinics are operated by PPRM. None of the eight clinics, however, can be named on the referral list mandated by section 59.8 because they do not provide prenatal care or social services.

3. These clinics are most likely to be the abortion service of choice for poor women because they are less expensive than private doctors. A first trimester clinic abortion will cost from $200–$350, while private doctors charge anywhere from within the same range to $800. Additionally, clinics accept referrals more quickly and easily.

4. All of these clinics generally provide options counseling to women who contact them to inquire about obtaining an abortion.

5. Other than these clinics, the only sources of reproductive health care for poor women in the communities where PPRM has Title X clinics are local health departments and, in some communities, non-profit community clinics, and private doctors.

6. Generally, private doctors charge full standard fees for their services; and thus they are not truly accessible to poor women.

7. The other clinics provide prenatal services. They do not, generally, provide testing, counseling or referrals to pregnant women.

8. There is a delay of anywhere from one to ten weeks to obtain an appointment with these clinics.

9. I believe that a woman who is pregnant and knows that she wants an abortion will most likely not follow up on a referral to a prenatal care clinic. She will not see the sense in doing so, or she will defer care until well into her pregnancy.

10. I believe that a woman who is uncertain about how she chooses to manage a pregnancy also will probably not follow up on such a referral.

11. Some communities where PPRM has a Title X clinic also have anti-abortion counseling centers. These are small organizations that lure pregnant women in for pregnancy tests and referrals for prenatal care, and which engage in aggressive advocacy to discourage choosing abortion.

12. PPRM may be required to include these centers on its referral lists.

13. Thus, the referral list mandated by section 59.8 cannot include information to help women expeditiously locate an abortion clinic; this information must be withheld from them. Instead, the list will contain information that will, to women who have not resolved to carry a pregnancy to term, seem irrelevant. Even those who try to utilize the list in search of helpful information will be jeopardized. They will face delays in being seen in legitimate prenatal clinics, and

the risk of being aggressively discouraged from choosing an abortion if they are seen in the anti-abortion centers.

DATED: Denver, Colorado
March 9, 1988

/s/ Sylvia Clark
SYLVIA CLARK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 88 W 158

PLANNED PARENTHOOD FEDERATION OF AMERICA, et al.,

Plaintiffs,

vs.

OTIS BOWEN, M.D.,

Defendant.

SECOND DECLARATION OF LESLIE DURGIN

LESLIE DURGIN, declares under penalty of perjury that the following is true and correct:

1. I am the Executive Director of plaintiff Boulder Valley Women's Health Center ("BVWHC"). I submit this Second Declaration to support plaintiffs' application for summary judgment.

2. In addition to BVWHC, the county health department and three non-profit community health clinics presently provide subsidized health services to poor women in the Boulder County area. (There is a fourth clinic in the area, but it is one of plaintiff PPRM's Title X clinics.)

3. There are, of course, also private doctors; but they are generally too expensive for poor women.

4. Neither the health department nor the community clinics provide testing, counseling or referral services for women who are, or suspect they may be, pregnant. Instead, they refer women to BVWHC for these services, and we, in turn, refer women to them for prenatal care and services.

5. A woman referred either to the health department or one of the community clinics for a prental appointment will wait about three weeks for that appointment.

6. I believe that a woman who knows that she wants an abortion will not follow up on such a referral because she will not see the relevance of prenatal care to her choice.

7. I also believe that a woman who is uncertain about whether or not to carry a pregnancy to term, or a woman with medical problems which are diagnosed at BVWHC and which are related to the pregnancy, likewise may not follow up on such a referral because she too will not see the relevance of a referral to a prenatal care service.

8. Also located in Boulder County is the Boulder Abortion Clinic which is the practice of Warren Hern, M.D. Hern is a nationally recognized expert in abortion practice, and the author of a standard text in the field, *Abortion Practice* (1984).

9. Hern regularly provides options counseling to women he treats.

10. BVWHC will not be permitted, however, to list Dr. Hern on its referral list because his principal business is abortion.

11. Thus, BVWHC will be forced to provide a referral list that not only provides no appropriate information to women seeking or considering an abortion, but it will actually hide from these women information that is appropriate and medically important to them.

DATED: Boulder, Colorado
March 9, 1988

/s/ Leslie Durgin
LESLIE DURGIN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 88 W 158

PLANNED PARENTHOOD FEDERATION OF AMERICA, et al.,
Plaintiffs,

vs.

OTIS BOWEN, M.D.,
Defendant.

DECLARATION

KARRIE GALLOWAY, declares under penalty of perjury that the following is true and correct:

1. I am the Executive Director of plaintiff Planned Parenthood Association of Utah ("PPAU"). I submit this Declaration to support plaintiffs' motion for a preliminary injunction.

2. PPAU receives a grant of approximately $450,000 in Title X funds from the defendant. PPAU uses those funds to operate six family planning clinics in Utah, to reimburse physicians who provide family planning services in their private offices in five communities pursuant to PPAU's rural health program, and to operate an Education Center.

3. PPAU is the only Title X grantee in the State of Utah. The Utah Department of Health is not eligible for Title X funds. See *Jane Does 1-4 v. Utah Department of Health*, 776 F.2d 253 (10th Cir. 1985).

4. Other than PPAU, subsidized reproductive health services are available in Utah in only a few counties, and then only to a limited degree.

5. PPAU's Title X clinics annually treat about 14,000 patients. About 50% of these patients receive free services and another 20% receive subsidized services according to a sliding fee scale that is based on the patient's income. Most of the remainder receive services at the Title X clinics, but pay a fee computed to cover the full costs of the services provided to them.

6. If the regulations at issue here take effect, PPAU will be forced to discontinue its Title X program for two reasons.

7. The first reason relates to the unethical and irresponsible censorship of medically necessary information that I understand the regulations will impose. I understand that the regulations will forbid our Title X clinics from providing any counseling or medical services to pregnant patients and will forbid those clinics from providing any information about abortion to any patient. If the pregnant woman faces a life-threatening emergency, I understand that we will be permitted to make a specific and appropriate referral; and if she has another medical condition of which we learn, we can tell her of it and advise her to seek treatment.

8. For reasons of ethics and liability, PPAU would not agree to comply with these restrictions. As I outline below, they will harm our patients.

9. Many of our patients first learn that they are pregnant at our clinics. Many then seek counseling about their options for managing that pregnancy. They may seek counseling because of medical conditions, such as cancer or diabetes, that threaten the health of either the woman or the fetus, because the pregnancy is unwanted, because it is the result of a sexual assault, or because the pregnancy will pose unmanageable burdens for the woman or her family. In these counseling situations, medical and ethical standards dictate that the woman receive objective information about all options available to her, including abortion.

10. The new regulations will, as I understand them, prevent PPAU's staff from providing any counseling to pregnant women about their options. Instead, we will be permitted only to provide pregnant patients a list of referrals to places that offer prenatal or social services and that promote the welfare of mothers and unborn children. These patients will thus be sent away without any information about their options, regardless of their need or desire for that information. They will, therefore, be forced to make medically and personally significant choices in ignorance.

11. They are unlikely to find this information elsewhere because of the low income level of most of our patients, and the almost total unavailability other than through PPAU of subsidized reproductive health care in Utah. Moreover, the referral list required by the regulations will often direct women to providers who are not equipped to respond either to the medical problems or to the personal concerns of our patients. The referral list will often affirmatively misdirect patients.

12. This ban on pregnancy counseling and appropriate referral endangers women who would eventually choose abortion because they will not obtain, or will be delayed in obtaining, the information and referrals necessary to exercise that choice. Abortion increases in risk as a pregnancy advances, and at some point becomes unavoidable. Therefore, the delay in giving women information will delay their exercising a choice. They will thus be forced either to undergo riskier abortions, or will lose that choice altogether.

13. Many patients consult our clinics for family planning services. We provide physical examinations, counseling and information about the benefits and risks of all available methods of contraception, and contraceptive methods.

14. For many women, because of certain factors such as age or cigarette smoking, the most effective method of contraception (i.e., the pill) may pose significant medical risk. For the purpose of allowing women in such situations to make informed choices, we provide counseling and information about alternative methods such as a barrier method, that

may be less effective but that, with the available backup of abortion, may be significantly safer.

15. For women who choose an intrauterine device ("IUD"), we provide information required by the Food and Drug Administration that, should the woman become pregnant with the IUD in place, an abortion should be considered. We also counsel about this information.

16. The new regulations will, as I understand them, forbid our Title X-funded clinics from providing counseling to our family planning patients about this information with respect to abortion.

17. Without an understanding of this information, they will be at increased medical risk in their contraceptive choices.

18. The new regulations will also force a radical censorship of our Educational Center. The Center is located in our Salt Lake City headquarters, with branches at our clinics. It is a library and resource center for students, parents, and educators, and contains books, files, and other materials on family planning, reproductive health, teenage pregnancy, sexuality education, and birth, growth, and development. It is staffed by educators who make presentations to interested groups.

19. All of the materials in our library are selected because we view them as objective, accurate, and neutral. Many of the materials mention or discuss abortion.

20. A few of the materials focus primarily on abortion.

21. Even though these materials are objective, neutral, and accurate, they are purchased with non-Title X funds.

22. The educators present information that is objective, accurate, and neutral. Often in a presentation, an educator will mention, refer to, or discuss abortion.

23. Occasionally, an educator will make a presentation that focuses on abortion. In these instances, however, even though the presentation remains objective, neutral, and accurate, salary and related expenses are paid by non-Title X funds.

24. As I understand the regulations, PPAU will have to eliminate all information about abortion from its Education Center or find another source of funding for it.

25. PPAU would not be able to fund the Center from existing revenues.

26. Therefore, PPAU would be forced either to eliminate the Education Center, or administer it in a way that presented inaccurate or incomplete information to the public.

27. The second reason relates to the regulations' provisions concerning "program integrity." These indicate that PPAU will undergo a review of its activities and structure to determine whether there is sufficient separation of its Title X activities from its other activities. Yet the regulations neither set forth the process for the review, nor the requirements to be met. Moreover, I understand that these requirements will have be be met because PPAU engages in activities to disseminate neutral and objective information about abortion, and to protect the right to legal abortion; and that these requirements would not be imposed if PPAU engaged in activities opposed to abortion.

DATED: Gearharts, Oregon
February 5, 1988

/s/ Karrie Galloway
KARRIE GALLOWAY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 88 W 158

PLANNED PARENTHOOD FEDERATION OF AMERICA, et al.,

Plaintiffs,

vs.

OTIS BOWEN, M.D.,

Defendant.

SECOND DECLARATION OF KARRIE GALLOWAY

KARRIE GALLOWAY, declares under penalty of perjury that the following is true and correct:

1. I am Executive Director of plaintiff, Planned Parenthood Association of Utah (PPAU). Prior to taking that position in December, 1987, I was, for four years, director of clinical services for PPAU. In that position, I was responsible for supervision of counseling and referral practices at PPAU clinic sites. As Executive Director, I remain responsible for ultimate supervision of counseling and referral services. Because we have not yet hired a replacement for the clinic director position I vacated, I retain direct responsibility over those services.

2. If the proposed regulations go into effect, our patients will not receive the counseling they need to resolve problem pregnancies and the information they need to obtain abortions.

3. Providers of abortion services accessible to low income women will not appear on the referral list which the regulations require to be provided to our patients. The regulations say that providers whose principal business is the provision of

abortions may not appear on the referral list. Yet, virtually all abortions in the State of Utah are performed at two free standing clinics whose principal business is provision of abortions: The Utah Women's Clinic and the Wasatch Women's Clinic, both in Salt Lake City. Although some abortions are performed at two hospitals, their services would not ordinarily be available to our patients. At one, the University of Utah Medical Center, only second trimester abortions are performed, and these only in life threatening circumstances. At the other, St. Mark's Hospital, a private institution, abortions are available only to patients of physicians on staff and second trimester abortions are performed only in cases of fetal abnormalities or life threatening circumstances. In contrast, Utah Women's Clinic, which would be excluded from the list, offers elective abortions though the twenty-first week of pregnancy (past that point, abortions are offered only for fetal abnormalities or life-threatening circumstances). Abortions at those hospitals are also many times more expensive then those offered at the two free standing clinics.

4. Although some doctors provide abortions to their private patients in their offices, they are generally unwilling to provide abortion services to Planned Parenthood's low income patients.

5. Because providers of accessible abortions will not appear on the referral list, and the new regulations forbid us from discussing abortion with our patients, they will be dependent for information about abortion and counseling upon the prenatal care and social services agencies which are permitted to appear on the list. These providers, however, are not set up to offer the type of expedited counseling and informational services routinely available at Planned Parenthood.

6. Such agencies, which will include state and county health departments and community health centers, are geared toward dealing with women who seek their services for prenatal care: to assist with a wanted pregnancy. Therefore, although questions may be answered on an *ad hoc* basis,

counseling and information regarding options for managing an unwanted or problem pregnancy, including abortion, are not routinely offered to patients. Moreover, no provider of prenatal care that would qualify to appear on the referral list has a distinct options counseling service such as that offered to all patients with positive pregnancy tests at Planned Parenthood. The only other agencies that have such an options counseling service are, in fact, the two abortion providers excluded from the referral list.

7. Whether a patient receives the counseling and information she needs at the referral agency will therefore depend on whether she actively seeks information and counseling and whether the particular staff person she encounters has the time and expertise to competently help her. Because the regulations bar counseling about or "promotion" of abortion, we will not be able to guide patients in how to get that counseling and information, even where it is available.

8. Moreover, it is highly unlikely that our patients will keep appointments for prenatal care when they want abortions or are even undecided about abortion. As previously stated, we will be unable to encourage them to keep the appointments in order to obtain counseling or information about abortion.

9. Even if the information is ultimately obtained, delay is created by having to get it from a secondary source rather than directly from PPAU. In addition, it may take as long as a month to get an appointment with some prenatal care providers.

10. As detailed in other declarations, delays add to health risks, but they also make abortions more expensive. First trimester abortions cost $250 at both the Utah Women's Clinic and the Wasatch Women's Clinic. At Utah Women's Clinic (the only one of the two that performs second trimester procedures) an abortion at 13 to 14 weeks costs $360, at 15 to 16 weeks, $500, at 17 to 18 weeks, $600, at 19 weeks, $700 and at 20-21 weeks, $900. These health and monetary burdens fall

particularly heavily on teenagers who already delay more than adult women in seeking help with problem pregnancies.

DATED: March 9, 1988

/s/ Karrie Galloway
KARRIE GALLOWAY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 88 W 158

PLANNED PARENTHOOD FEDERATION OF AMERICA, et al.,

Plaintiffs,

vs.

OTIS BOWEN, M.D.,

Defendant.

DECLARATION

DAVID A. GRIMES, M.D., declares under penalty of perjury:

1. I am a physician licensed to practice medicine in California, Georgia and North Carolina.

2. I am Professor of Obstetrics and Gynecology and Professor of Preventive Medicine at the University of Southern California (USC) School of Medicine in Los Angeles, California.

3. I am also engaged in the private practice of medicine, specializing in obstetrics and gynecology. As part of my practice I counsel and treat pregnant women and perform abortions.

4. Prior to accepting the position of Professor at USC, I was with the Department of Health and Human Services' Centers for Disease Control (CDC) in Atlanta for nine years. From 1983 to 1984, I was chief of the Abortion Surveillance Branch of the CDC. In this position, I was the principal health official within the Department of Health and Human Services (DHHS) responsible for monitoring abortions throughout the United States, including their incidence and

the mortality and morbidity (complications) associated with them. While working at the CDC, I personally supervised data collection and evaluation of over 10 million abortions.

5. I have published over 50 articles on abortion and maternal health in medical journals. I am an expert in abortion epidemiology: the study of the safety of abortion and prevention of its complications.

6. I submit this affidavit in support of plaintiffs' motion to enjoin regulations recently promulgated by DHHS to govern federally-funded family planning clinics.

7. The ban on abortion counseling and referral will harm the health of women and violate the professional and ethical duties of physicians.

8. Any delay increases the health risks of abortion. For example, a woman 11 to 12 weeks pregnant who delays an abortion until the 13- to 14-week range doubles her risk of death and serious complications. With increasing gestation, the cost of the procedure also rises, while its availability decreases. It is imperative, therefore, that women desiring abortions obtain the earliest possible access to services.

9. There are numerous instances where women have preexisting medical conditions which pregnancy may worsen. These include diabetes, cardiac disease, collagen vascular diseases, kidney disorders, and certain cancers. It is rare for these conditions to be imminently life-threatening when diagnosed in early pregnancy. Rather, the pregnancy may worsen the condition to the extent of eventually threatening the woman's life or hastening her death. In others, it may mean the woman's health could be permanently adversely affected. One of these situations is diabetic retinopathy, where pregnancy can so worsen the condition as to cause blindness.

10. In such situations, protection of the patient's health requires the physician to advise the woman that abortion is an option she should consider, although the choice between accepting the health risks entailed in continuing the pregnancy or terminating it is ultimately hers. If the woman

decides on abortion, the physician should provide a referral to an abortion provider if he or she does not provide abortions. Moreover, because abortions become more dangerous, expensive and difficult to obtain the later in pregnancy they are performed, it is especially imperative that when a woman has chosen an abortion which is indicated for medical reasons, any referral be prompt and directly to a provider of abortion services rather than an intermediary "social service" or prenatal care agency.

11. Another situation where counseling and referral regarding abortion is medically indicated is when a woman becomes pregnant with an IUD in place which cannot be removed. In such situations, the presence of the IUD may cause a spontaneous septic abortion which can endanger the woman's life. It is therefore recognized medical practice to discuss the possibility of early induced abortion with these patients before the situation becomes a life-threatening emergency.

12. Another situation where physicians would be derelict in their professional and ethical duties to discuss abortion with a patient is where there is the known or suspected possibility of genetic or congenital problems with the fetus. Some of these problems are incompatible with life or survival past infancy. An increasingly widespread example is AIDS. When a woman tests positive for the virus which causes AIDS, her fetus stands up to a 50 percent chance of being infected by the virus during gestation or birth. Most of these infants suffer greatly and die in the first years of life. If a physician is aware that a pregnant patient is infected with the virus, it is his or her medical and ethical obligation to advise the patient of the risk to her fetus and the option of abortion if she wishes to avoid the risk.

13. Other examples of conditions which a family planning clinician may be aware of and for which counseling regarding abortion is professionally obligatory include Tay Sachs disease, a condition which invariably causes death in infancy or early childhood and is most prevalent among Jews of Eastern

European origin. If a provider is aware that a patient has a family history of the disease, he or she is professionally obligated to advise the patient of the availability of tests for the disease and of the options should the outcome show the fetus is afflicted.

14. Another example, Down's Syndrome (mongolism), is a genetic anomaly that usually causes retardation. Since the risk is greatest among women over the age of 35, such women should be advised of the availability of amniocentesis to test for the condition and the options if the fetus is found to have it.

15. Apart from abortion, there are conditions which occur during pregnancy which require referral to specialized providers. For example, a physician finding an early cancer in the breast of a patient should promptly refer her to a surgeon. By allowing referral, when a condition "relates to pregnancy," only to providers of generalized prenatal care, the regulations would delay treatment and thus endanger the lives of such pregnant women and their offspring.

DATED: February 4, 1988

/s/ David A. Grimes, M.D.

DAVID A. GRIMES, M.D.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 88 W 158

PLANNED PARENTHOOD FEDERATION OF AMERICA, et al.,

Plaintiffs,

vs.

OTIS BOWEN, M.D.,

Defendant.

DECLARATION

KIRTLY JONES, M.D., declares under penalty of perjury that the following is true and correct:

1. I am the Medical Director of plaintiff Planned Parenthood Association of Utah ("PPAU"). I am also Assistant Professor of Obstetrics and Gynecology at the University of Utah Medical Center in Salt Lake City, Utah.

2. I submit this declaration to support plaintiffs' request for a preliminary injunction staying the regulations that are the subject of this action from taking effect.

3. I am responsible for the medical care and counseling provided to the approximately 14,000 patients treated by PPAU each year. I carry out this responsibility by training staff and reviewing patient charts at all of PPAU's clinics and by seeing, personally, approximately 60 patients each month who have special medical problems.

4. I am familiar with the statements made in the Declaration of Karrie Galloway about the injuries to patients and breaches of duty by PPAU staff that the regulations will impose. I agree with those statements.

5. I want to highlight two particular areas of PPAU's practice where the impact of the censorship imposed by the regulations will be particularly egregious.

6. The first area involves counseling PPAU provides to pregnant women. Many women contact us for advice about the effect of drugs or infectious viruses upon a pregnancy they would like to carry to term. Common among these drugs are accutane, which is commonly prescribed for acne but will cause congenital heart defects in a fetus, as will lithium, which is commonly prescribed for manic-depressive behavior. Many street drugs, including cocaine and heroin, have profound effects on a fetus which might affect a woman's decision to take a pregnancy to term. Infectious viruses such as rubella or the AIDS virus are transferred across the placenta to cause congenital rubella or AIDS in the newborn infant, and this also affects a woman's decision about whether to carry to term.

7. I see some of these women personally, and PPAU's staff regularly consults me before advising the others.

8. We have a duty, I believe, not only to counsel these women about the drugs and their effects on the fetus, but also to discuss their options for managing the pregnancy when the drugs have likely caused a problem.

9. Among these options is abortion.

10. We carefully provide only objective, non-directive information.

11. Failure to do so will cause serious harm to some of these patients, will inevitably result in women unwittingly assuming high risk pregnancies, children born with congenital malformations, and I believe would be a breach of my and PPAU's duties to our patients.

12. The second area involves contraceptive counseling. Many women who come to PPAU have an initial preference for the birth control pill. For reasons relating to age or medical condition, such as diabetes or hypertension, the medical

risks associated with the pill are too high. For many of these same women, an intrauterine device ("IUD") is not a possible option.

13. I directly counsel many of these patients.

14. I believe that I am obligated to counsel these patients about the advisability of choosing a barrier method.

15. I believe that I am also obligated to discuss with them the risks of failure associated with a barrier method, the significant health risks to them of pregnancy and childbirth, and the availability and relatively low health risks of abortion as a backup.

16. As I understand the regulations, I would no longer be able to counsel these patients with respect to abortion.

17. Failure to do so would place the health of some of these women in significant peril and would, I believe, breach my duty to them.

DATED: Salt Lake City, Utah
February 4, 1988

/s/ Kirtly Jones, M.D.
KIRTLY JONES, M.D.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 88 W 158

PLANNED PARENTHOOD FEDERATION OF AMERICA, et al.,
Plaintiffs,

vs.

OTIS BOWEN, M.D.,
Defendant.

DECLARATION

THOMAS M. VERNON, declares under penalty of perjury that the following is true and correct:

1. I am the Executive Director of the Colorado Department of Health ("Department"). I submit this Declaration to support plaintiffs' motion for a preliminary injunction.

2. The Department is the grantee of Title X funds in the State of Colorado. The Department receives about $1.2 million annually pursuant to the Title X program.

3. We distribute these funds to 23 providers of health services. These providers include two of the plaintiffs here, Planned Parenthood of the Rocky Mountains ("PPRM") and Boulder Valley Women's Health Center ("Boulder Valley"). The other providers are two hospitals, one other not for profit agency, and 18 local health departments or local county health providers.

4. We also distribute about $1 million in state funds to these providers.

5. Through this system, subsidized reproductive health care is provided to over 40,000 patients. Approximately 85% of these patients have incomes at or below 150% of the feder-

ally defined poverty level, and approximately 33% of these patients are under the age of 20. Thus this system largely provides services to people who are not likely to find care elsewhere.

6. Among the services provided are pregnancy tests and counseling to almost 7,000 patients. Under existing Title X guidelines and accepted standards of medical care, the counseling is voluntary, nondirective, and covers all options legally available for managing a pregnancy. These are carrying to term and keeping the child, adoption, and abortion. Women who choose abortion are given the names of facilities where abortions are performed.

7. The regulations will eliminate the provision of this crucial information to these women who are Colorado's poorest and least likely to find it elsewhere.

8. The result will be more unwanted children.

9. Moreover, I believe restricting physicians' and other medical professionals' ability to provide needed information to their patients is ethically and professionally unacceptable.

10. These same problems will arise in the family planning counseling provided by our grantees.

11. Sometimes it is medically appropriate to discuss abortion when counseling about methods of contraception. This would occur, for example, when counseling a woman for whom an intrauterine device ("IUD") is the method of choice. The Food and Drug Administration requires that she be informed that should she become pregnant with the IUD in place, she should consider obtaining an abortion.

12. I understand that the regulations will stifle the ability of our grantees to meet this duty.

13. As a result, many women will choose a contraceptive method without having received complete information, thereby incurring unnecessary and significant health risks.

14. I understand that PPRM and Boulder Valley will probably discontinue their Title X programs rather than comply

with these restrictions on their abilities to communicate honestly and objectively with their patients. I expect that many, if not all, of the Department's other Title X grantees will do likewise.

15. This will have a catastrophic effect on health care for poor women in Colorado both because of the loss of these services from established providers with whom they are familiar, but also because of the uncertainty of whether the Department will be able to locate competent providers willing to practice medicine under the unethical restraints imposed by the regulations.

DATED: Denver, Colorado
February 4, 1988

/s/ Thomas M. Vernon, M.D.
THOMAS M. VERNON, M.D.

Supreme Court, U.S.
FILED
JUL 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 89-1391, 89-1392

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DR. IRVING RUST, *et al.*,
Petitioners,

v.

DR. LOUIS SULLIVAN, or his successor,
Secretary of the United States Department
of Health and Human Services,
Respondent.

THE STATE OF NEW YORK, *et al.*,
Petitioners,

v.

DR. LOUIS SULLIVAN, or his successor,
Secretary of the United States Department
of Health and Human Services,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF TWENTY-TWO BIOMEDICAL ETHICISTS AS AMICI CURIAE SUPPORTING PETITIONERS

CATHERINE L. FISK
DONOVAN LEISURE, ROGOVIN,
HUGE & SCHILLER
1250 24th Street, N.W.
Washington, D.C. 20037
(202) 467-8300

MICHAEL E. FINE *
DOUGLAS W. SMITH
CLYDE SPILLENGER
POWELL, GOLDSTEIN, FRAZER
& MURPHY
1001 Pennsylvania Avenue, N.W.
Sixth Floor
Washington, D.C. 20004
(202) 347-0066
Counsel for Amici Curiae

* Counsel of Record

July 27, 1990

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Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 Yale L.J. 219 (1985)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

Nos. 89-1391, 89-1392

DR. IRVING RUST, *et al.*,
Petitioners,
v.
DR. LOUIS SULLIVAN, or his successor,
Secretary of the United States Department
of Health and Human Services,
Respondent.

THE STATE OF NEW YORK, *et al.*,
Petitioners,
v.
DR. LOUIS SULLIVAN, or his successor,
Secretary of the United States Department
of Health and Human Services,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF TWENTY-TWO BIOMEDICAL ETHICISTS AS AMICI CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICI CURIAE *

Amici are a group of 22 physicians, attorneys and others who teach medical ethics, or who have a major professional interest in medical ethics. Although the precise beliefs and practices of the members of this group

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* Counsel of record to the parties in this case have consented to the filing of this brief and letters of consent have been filed with the clerk pursuant to Rule 37.

vary, the members believe that permitting patients to make important, personal medical decisions in consultation with their physicians is a fundamental principle of medical ethics, and that the tradition of unfettered physician-patient dialogue is central to that principle. Permitting the government to dictate the medical information that can be provided in the doctor-patient dialogue would undermine principles of medical ethics and compromise principles of good patient care and medical practice to the detriment of patients and physicians alike.

SUMMARY OF ARGUMENT

Patients have a liberty interest in receiving complete and uncensored information about medical alternatives when seeking medical advice or counseling. This Court articulated the liberty interest in bodily integrity in the recent case of *Cruzan v. Director, Missouri Department of Health*. A constituent element of that right and the doctrine of informed consent is the receipt of full information about the patient's medically appropriate options and the risks related to each.

This liberty interest in full medical disclosure has its source in both medical ethics and common law precepts concerning the physician-patient relationship. Under established law and practice, patients have come to rely on physicians and other health care professionals for all medical information necessary to permit them to make informed decisions about their own health care.

The Title X counseling and referral regulations challenged in this case infringe this liberty interest. The imparting of incomplete medical information can pose serious health dangers to patients. Title X patients are particularly threatened, because they often have no other source of medical advice.

There is no government interest justifying this infringement on the patient's liberty interest. The fact that the challenged Title X restriction is a condition of federal funding is constitutionally inconsequential.

ARGUMENT

I. PATIENTS HAVE A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST IN EXERCISING CONTROL OVER THEIR OWN MEDICAL TREATMENT DECISIONS, AND THAT INTEREST IS INFRINGED BY THE TITLE X COUNSELING AND REFERRAL RESTRICTIONS.

Amici concur in petitioners' argument that the Title X regulations restricting abortion-related counseling and referrals[1] conflict with Title X of the Public Health

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[1] *Amici*'s discussion is directed at the counseling and referral regulations at issue in this case, 42 C.F.R. § 59.8 (1989), which provide in pertinent part:

> (a) (1) A Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.
>
> (2) Because Title X funds are intended only for family planning, once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child. She must also be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept. In cases in which emergency care is required, however, the Title X project shall be required only to refer the client immediately to an appropriate provider of emergency medical services.
>
> (3) A Title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by "steering" clients to providers who offer abortion as a method of family planning.
>
> (4) Nothing in this subpart shall be construed as prohibiting the provision of information to a project client which is medically necessary to assess the risks and benefits of differ-

Service Act, Pub. L. No. 91-572, 84 Stat. 1504 (codified as amended at 42 U.S.C. §§ 300-300a-6a (1989)), and with the first and fifth amendments to the United States Constitution, and believe that the decision of the court below must be reversed on these grounds. In addition, *amici* believe that these regulations are constitutionally infirm because they compel physicians and clinicians to violate their professional obligations to provide patients with complete and accurate medical advice, and undermine patients' legitimate expectation that medical advice will include full disclosure of relevant alternatives, thus infringing the rights of patients under the due process clause of the fifth amendment to the United States Constitution.

A. Full and Informed Disclosure of Medical Options Is Integral to the Right of Patients to "Bodily Integrity" Recognized in *Cruzan*.

The principle that a patient is entitled to complete disclosure from her physician of the risks of and alternatives to medical treatment is basic to medical ethics. This principle applies from the initiation of medical consultation to a successful medical outcome. It reflects the established belief that patients should have control over their own medical treatment decisions, and that patients consult physicians with the legitimate expectation that medical advice will be full, frank, and uncensored. Consequently, a cardinal premise of the medical profession is that "[t]he patient's right of self-decision can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. . . . The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice." *Current Opinions of the*

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ent methods of contraception in the course of selecting a method; *provided*, that the provision of this information does not include counseling with respect to or otherwise promote abortion as a method of family planning.

Council on Ethical and Judicial Affairs of the American Medical Association ¶ 8.08 (1989) [hereinafter *AMA Current Opinions*].

As noted below, these rights and duties are embodied in the medical profession's ethical canons, in the common law of most states, in the statutes of several states, and in decisions of this Court. The Title X restrictions on counseling and referrals are flatly inconsistent with these ethical and legal principles, and would in fact compel grantees to violate them by denying patients relevant and necessary medical information.

This Court has strongly intimated that "bodily integrity" and the right of a patient to exercise control over her own treatment decisions are basic constitutional liberties. In *Cruzan v. Director, Missouri Department of Health*, —— U.S. ——, 58 U.S.L.W. 4916 (1990), the Court suggested that a person has a cognizable liberty interest in refusing unwanted medical treatment. The Court in *Cruzan* stated that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions,"[2] although it recognized that so significant a constitutional principle should not be defined without the benefit of a case or controversy to "inform the inquiry." *Cruzan*, 58 U.S.L.W. at 4920. *See also id.* ("the logic of the cases . . . would embrace such a liberty interest"); *id.* at 4922 (O'Connor, J., concurring) ("I agree that a protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions").

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[2] Although portions of the Court's analysis in *Cruzan* focused on the specific situation in which a competent person seeks to refuse life-sustaining medical treatment, the Court relied upon other cases recognizing "a general liberty interest in refusing medical treatment," *Cruzan*, 58 U.S.L.W. at 4920, including *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905) (recognizing an individual's liberty interest in declining an unwanted smallpox vaccine).

As the Court observed in *Cruzan*, our culture's recognition of the patient's right of self-determination in medical decisionmaking is expressed in the common-law doctrine of "informed consent"—a doctrine the Court described as "firmly entrenched in American tort law." 58 U.S.L.W. at 4918. The informed consent doctrine, however, embraces more than the right of a competent patient to decline medical treatment. It also embraces a patient's legitimate expectation of complete disclosure by the physician of the risks of the recommended course of treatment and of all reasonable medical alternatives. Indeed, it is this latter conception that is encompassed by the word "informed" in the term "informed consent." As is illustrated below, the informed consent doctrine has come to include, both in the ethical canons of the healing professions and in the legal principles governing the rights and duties of physician and patient, a broad right on the part of patients to have complete medical information before their consent to a particular course of medical action can be regarded as valid. Just as the patient has a liberty interest in declining unwanted medical treatment, she has a liberty interest in receiving the complete and uncensored medical information that permits informed medical decisionmaking.

B. The Medical Profession's Ethical Standards Embody The Doctrine of Informed Consent and Embrace a Duty to Counsel Patients on All Legitimate Treatment Alternatives.

A physician's duty to provide patients with complete information is not merely a requirement imposed on physicians by courts and legislatures.[3] It emanates from

[3] As a recently-convened Presidential Commission has observed, the informed consent doctrine, in addition to having its foundation in law, "is essentially an ethical imperative." 1 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions: The Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship* 2 (1982) [hereinafter *Making Dec*].

the medical profession's own ethical imperatives, which have guided the practice of medicine at least since the days of Hippocrates. For example, Plato included patient autonomy in his definition of individual freedom:

> The free practitioner who, for the most part, attends free men, treats their disease by going into things thoroughly from the beginning in a scientific way, and takes the patient and his family into his confidence. . . . He does not give his prescriptions until he has won the patient's support.

Plato, *Laws*, 4720b-e.

The doctor-patient relationship described by Plato has become the model for modern medical ethics based on the principle of patient autonomy: the patient voluntarily seeks medical advice or assistance; the doctor assesses the medical options and discusses them with the patient; and together they decide upon a course of action, whether it be treatment or referral to another physician. This relationship is privileged and confidential in order to protect the patient's right to bodily autonomy[4]—to decide on his or her medical treatment. The ethical and legal doctrine of informed consent has developed in order to foster and enhance the doctor-patient discussion and facilitate the process of shared decisionmaking essential to a patient's ability to make knowledgeable medical choices.

The principle of medical disclosure, while always oriented to the patient's best interests, has evolved over

[4] The right to bodily autonomy, referred to in *Cruzan* and discussed below, has been recognized in other contexts by this Court as a constitutionally protected liberty interest. *See, e.g., Winston v. Lee*, 470 U.S. 753 (1985) (fourth amendment prohibits forced surgery unless state has more substantial justification than traditional probable cause); *Schmerber v. California*, 384 U.S. 757 (1966) (fourth amendment requires more than probable cause to justify extracting blood without defendant's consent); *Rochin v. California*, 342 U.S. 165 (1952) (due process prohibits forced stomach pumping).

time. At one time, medical ethics followed a *therapeutic* model which countenanced departures from full disclosure if such disclosure was deemed inimical to a patient's best medical interests. *See Salgo v. Leland Stanford, Jr. University Board of Trustees*, 154 Cal. App. 2d 560, 578, 317 P.2d 170, 181 (1957) ("[I]n discussing the element of risk a cetrain amount of discretion must be employed consistent with the full disclosure of facts necessary to an informed consent.") *See generally* R. Faden & T. Beauchamp, *A History and Theory of Informed Consent* 74-88 (1986). More recently, this paternalistic approach has given way to an *autonomy* model, which for the most part disavows the notion that restrictions on disclosure can be in the patient's best medical interests. *See* I *Making Decisions*, *supra*, at 32-39 (discussing the shift from "medical paternalism" to "patient sovereignty").

The primacy of patient autonomy and the related duty of the doctor to encourage such autonomy was first expressed in a 1960 decision in which the Kansas Supreme Court observed that:

> Anglo-American law starts with the premise of thorough-going self-determination. It follows that each man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of life-saving surgery, or other medical treatment. *A doctor might well believe that an operation or form of treatment is desirable or necessary but the law does not permit him to substitute his own judgment for that of the patient by any form of artifice or deception.* (Emphasis supplied)

Natanson v. Kline, 186 Kan. 393, 406-07, 350 P.2d 1093, 1104 (1960).

Today, there is a clear societal consensus that patients have an inherent right to exercise choice in medical decisionmaking, and that physicians have a corresponding

obligation to provide information on alternatives necessary to permit patients to make fully informed choices. The physician-patient relationship, which is private by nature, especially requires openness and freedom to discuss treatment options frankly. As repeatedly noted in the standard medical ethical texts, "[e]thically valid consent is a process of shared decisionmaking based upon mutual respect and participation, not a ritual to be equated with reciting the contents of a form that details the risks of particular treatments." 1 *Making Decisions*, *supra*, at 2. In order to make decisions about their care, patients "must have all relevant information regarding their condition and alternative treatments." *Id.*

The ethical foundation of the modern doctrine of informed consent is personal autonomy and self-determination.[5] *Id.* at 44-51. This foundation has been well described by Professor Shultz:

> Individuality and autonomy have long been central values in Anglo-American society and law. In general, the more intense and personal the consequences of a choice and the less direct or significant the impact of that choice upon others, the more compelling the claim to autonomy in the making of a given decision. Under this criterion, the case for respecting patient autonomy in decisions about health and bodily fate is very strong.

Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 Yale L.J. 219, 220 (1985) (footnotes omitted). *See also* Dworkin, *Autonomy and Informed Consent*, *in* 3 *Making Decisions*, *supra*, at 63-81.

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[5] A patient's right to complete and candid medical advice is also founded on the related ethic of promoting personal well-being. Full disclosure fosters personal well-being by giving each patient an opportunity to select the course of treatment that best satisfies his or her own complex set of preferences, rather than relying on the physician's speculation about what would be optimal for the patient. 1 *Making Decisions*, *supra*, 42-44.

The medical ethic underlying the informed consent doctrine also is expressed in the American Medical Association's "Principles of Medical Ethics," which provide with respect to informed consent that:

> [T]he patient's right of self-decision can be effectively exercised *only if the patient possesses enough information to enable an intelligent choice.* The patient should make his own determination on treatment. The physician's obligation is to present the medical facts accurately to the patient or to the individual responsible for his care and to make recommendations for management in accordance with good medical practice. The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice.

AMA Current Opinions, *supra*, at ¶ 8.08 (emphasis supplied); *see also id.* at ¶ 8.12 (requiring physician to "properly inform the patient of the diagnosis and of the nature and purpose of the treatment undertaken or prescribed. The physician may not refuse to so inform the patient."). AMA policy likewise provides that health care professionals should inform patients of alternative treatments and the related risks: "Full disclosure is appropriate in all cases, except in rare situations in which such information would, in the opinion of the health care professional, cause serious harm to the patient."[6] *AMA Policy Compendium: Current Policies of the AMA House of Delegates Through the 1989 Interim Meeting* ¶ 32.007(1) (1990).

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[6] As suggested by the quotation in the text, the ethical principle of disclosure is qualified only in certain limited circumstances. The AMA Principles provide that: "[i]nformed consent is a basic social policy for which exceptions are permitted (1) where the patient is unconscious or otherwise incapable of consenting and harm from failure to treat is imminent; or (2) when risk-disclosure poses such a serious psychological threat of detriment to the patient as to be medically contraindicated." *AMA Current Opinions*, *supra*, at 32.

AMA guidelines further emphasize the special importance of ensuring a full exchange of information in ethically sensitive situations. The guidelines provide that "[W]hen making treatment decisions that involve ethical choices, health care professionals and patients (or their authorized representatives) should strive for a high level of mutual understanding and shared decisionmaking." *Id.* at ¶ 32.008(1).

These same ethical standards guide the American College of Obstetricians and Gynecologists, which provides in its *Standards for Obstetric-Gynecologic Services* that:

> [i]t is the physician's responsibility to inform the patient of the nature of the surgical or medical procedure being recommended. In most cases, the explanation should encompass the nature of the condition or illness that requires medical or surgical intervention, the recommended course of treatment and its alternatives, the risks and potential complications of the treatment, and its relative chances of success.

American College of Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services* 88-89 (7th ed. 1989) [hereinafter *ACOG Standards*]. The *ACOG Standards* further provide that a "patient should have an adequate opportunity to ask questions in order to ensure that she understands the information." *Id.*

Importantly, a physician's obligation to provide patients with information needed to ensure informed consent applies even if the physician has only been consulted for advice or diagnosis and will ultimately refer the patient to another health care provider for the actual medical treatment. Indeed, the American College of Obstetricians and Gynecologists standard quoted above refers to "recommended" treatment and does not presuppose that the physician will ultimately perform the procedure elected by the patient. If a physician performing even limited diagnostic and counseling services

becomes aware of medical facts or conditions that should be discussed with a patient the physician has an ethical responsibility to share that information with the patient even if another doctor will ultimately perform any additional therapy or treatment the patient chooses to undergo. *See AMA Current Opinions, supra,* at ¶ 3.05 ("a physician may choose to limit his practice to certain diagnostic services, [but] he may not neglect a patient under his care").[7]

In sum, reflecting prevailing standards of human autonomy and dignity, the medical profession has incorporated into its ethical canons a broad right on the part of patients to make medical treatment decisions based on complete disclosure of medical risks and alternatives. While these canons are not themselves sources of state law or constitutional rights, they are the strongest kind

[7] Courts have recognized a related legal duty to disclose information relevant to procreation decisions, whether or not a physician will even be invoked in providing the relevant medical service. For example, in *Schroeder* v. *Perkel*, 87 N.J. 53, 432 A.2d 834 (1981), the New Jersey Supreme Court held that pediatricians had a duty to disclose to parents the fact that their first child had cystic fibrosis and that any potential future children might be born with that condition as well. Even though the pediatricians would not have provided the pregnancy care themselves, the court found that the parents had a cause of action against them for failing to provide them with sufficient information to make an informed choice about whether to bear a second child. Similarly, in *Dumer v. St. Michael's Hospital*, 69 Wis. 2d 766, 233 N.W. 2d 372 (1975), the Wisconsin Supreme Court held that the doctor had a duty to inform his pregnant patient that she had rubella and that she risked giving birth to a baby with congenital defects, so she could choose whether to give birth or not. The fact that the doctor was not her obstetrician was not relevant.

A physician's duty to disclose also extends to referral to other health care providers for additional treatment if necessary. For example, in *Moore v. Preventive Medicine Medical Group Inc.*, 178 Cal. App. 3d 728, 223 Cal. Rptr. 859 (1986), a California court found that the doctor had a duty to disclose the risk of not being examined by a specialist.

of evidence that a patient's stake in the exercise of a medical choice, based on full disclosure by physician to patient, constitutes a liberty interest that the government may not summarily and arbitrarily extinguish.

C. The Right to Complete and Accurate Medical Advice Is Embodied in State Informed Consent Law.

The legal doctrine of informed consent reflects standards of disclosure and openness in the physician-patient dialogue that are rooted in history and in the medical profession's ethical precepts. The evolution of this doctrine also illustrates the central role of patient autonomy in the medical decisionmaking process.

As this Court observed in *Cruzan*, the doctrine of informed consent "has become firmly entrenched in American tort law." 58 U.S.L.W. at 4818. By holding physicians accountable for failing to apprise patients of the risks attending and alternatives to a particular medical option, state informed consent law affirms the profession's own ethical standards and explicitly recognizes the right of patients to receive full information necessary to make informed decisions about the medical treatment they will, or will not, undergo.

The seminal judicial articulation of the informed consent principle is widely regarded to be Justice Cardozo's statement in *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914), quoted in *Cruzan*, 58 U.S.L.W. at 4917, that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages." While *Schloendorff* and other early cases announcing the informed consent doctrine were more concerned with the problem of unwanted treatment forced on the unconsenting (and often unaware) patient than with the uninformed or inadequately advised patient,

they were instrumental in defining the legal duty of physicians to respect and to foster their patients' autonomy. *See generally* R. Faden & T. Beauchamp, *supra*, at 123-25.

As of this writing, all but three states have explicitly recognized that a patient's consent cannot be valid unless she has full knowledge of the risks of the particular form of treatment and of legitimate alternatives to that treatment. *See* 3 *Making Decisions*, *supra*, at 193 & n.4. A review of state law demonstrates that the duty of physicians to disclose extends not only to the *risks* associated with a particular medical treatment but also to the existence of medical *alternatives* to that treatment. By failing adequately to notify a patient of available treatment alternatives, the physician in effect fails to divulge sufficient information for the patient to make an inteiligent choice.

That the duty to disclose applies not only to risks[8] but also to medical alternatives was made explicit by the U.S. Court of Appeals for the D.C. Circuit in *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972). In considering the duty owed to a patient paralyzed following a back operation who had not

[8] Early cases focused on the duty to inform about the *risks* of a proposed treatment. *See, e.g., Cobbs v. Grant*, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972) (duty to inform patient of known risks of a surgical procedure); *Truman v. Thomas*, 27 Cal. 3d 285, 298-301, 611 P.2d 902, 905-08, 165 Cal. Rptr. 308, 320-22 (1980) (duty to inform of danger of failing to undergo pap smear); *Natanson v. Kline*, 186 Kan. at 409-10, 350 P.2d at 1103-07 (1960) (duty to disclose possible risks and consequences of radiation therapy); *McPherson v. Ellis*, 305 N.C. 266, 270-73, 287 S.E.2d 892, 895 (1982) (duty to inform patient of paralysis risk of arteriogram); *Wilkinson v. Vesey*, 110 R.I. 606, 619-30, 295 A.2d 676, 685-90 (1972) (duty to disclose risks of radiation therapy); *Gates v. Jensen*, 92 Wash. 2d 246, 251, 595 P.2d 1155, 1159-61 (1979) (duty to disclose all facts physician "knows or should know which the patient needs in order to make the decision" regarding medical alternatives including in "nontreatment situations").

been warned in advance of this risk, the D.C. Circuit observed:

> The root premise is the concept, fundamental in American jurisprudence, that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body. . . ." *True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each.* The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision. From these almost axiomatic considerations springs the need, and in turn the requirement, of a reasonable divulgence by physician to patient to make such a decision possible. (emphasis supplied)

464 F.2d at 780 (quoting *Schloendorff*, *supra*, 211 N.Y. at 129-30, 105 N.E. at 93) (footnote omitted).

Similarly, in *Scott v. Bradford*, 606 P.2d 554, 556-59 (Okla. 1980), the Oklahoma Supreme Court held that the doctor had a duty to disclose not only the risks of hysterectomy surgery but also that there were alternatives to this surgery. Relying on *Canterbury v. Spence*, the Court emphasized that a patient's consent is meaningful only when she is given full information about her medical options: "[t]rue consent to what happens to one's self is the informed exercise of a choice. *This entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each.*" *Id.* at 557 (emphasis supplied). *See also Dunham v. Wright*, 423 F.2d 940, 943-46 (3d Cir. 1970) (holding that under Pennsylvania law, patient is entitled to full disclosure of risks and alternatives to surgery); *Archer v. Galbraith*, 18 Wash. App. 369, 567 P.2d 1155 (1977) (holding that physician must inform patients of alternatives to thyroid surgery).

A number of states have by statute explicitly codified the scope of a doctor's duty to disclose both the risks of and alternatives to a proposed course of treatment. For example, New York defines lack of informed consent as "the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives as a reasonable medical . . . practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation." N.Y. Pub. Health Law § 2805-d (McKinney 1989). Other statutes mandate disclosure for specific medical procedures. *See, e.g.*, Cal. Welf. & Inst. Code § 5326.85 (Deering 1990) (electroconvulsive therapy); Or. Rev. Stat. §§ 436.205, 436.225 (1989) (sterilization). *See generally* 3 *Making Decisions*, *supra*, 204-51 (describing each state's statutes and/or case law on informed consent).

D. The Patient's Right to Receive from an Advising Physician Information Regarding All Medically Sound Alternatives Applies to Medical Decisions Relating to Procreation.

A physician's duty to advise a patient of available treatment options applies to all medical treatment decisions, including those involving procreation. In particular, whether or not to continue a pregnancy is such a medical treatment decision.

As this Court observed in *Roe* v. *Wade*, 410 U.S. 113, 165-66 (1973), the decision whether to terminate a pregnancy is "inherently, and primarily, a medical decision." The *ACOG Standards* accordingly provide:

> In the event of an unwanted pregnancy, the physician should counsel the patient about her options: (1) continuing the pregnancy to term and keeping the infant, (2) continuing the pregnancy to term and offering the infant for legal adoption, or (3) aborting the pregnancy.

ACOG Standards, *supra*, at 62. That the abortion procedure may be a controversial one, or that some physicians may be opposed to performing it, does not change the fact that abortion is a legitimate medical procedure that is generally regarded as medically indicated under certain circumstances. As such, the same disclosure obligations apply to abortion as to any other legitimate medical alternative.[9]

ACOG's reference to "counseling" is particularly significant. As this Court repeatedly has recognized in considering the constitutionality of state laws regulating abortion, physicians must be free to provide their patients with full, accurate and medically appropriate counseling. Thus, for example, in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), the Court struck down a Pennsylvania statute that compelled physicians to provide various kinds of information to a woman prior to receiving her consent to terminate a pregnancy. The Court characterized the statute's requirements, which it regarded as "the antithesis of informed consent," 476 U.S. at 764, as "nothing less than an outright attempt to wedge [Pennsylvania's] message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician." 476 U.S. at 762. Similarly, in *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 443 (1983), the Court observed that "[i]t remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances." *See also Planned Parenthood v. Danforth*, 428 U.S. 52, 67 n.8

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[9] *Cf. Bartling v. Superior Court*, 163 Cal. App. 3d 186, 195, 209 Cal. Rptr. 220 (1984) (hospital required to withdraw life support system, notwithstanding moral objections); *In re Guardianship of Grant*, 109 Wash. 2d 545, 567 n.6, 747 P.2d 445, 456 n.6 (1988) (physician may not frustrate patient's choice of a legitimate alternative because of moral objections, but instead is obligated to refer patient to another physician who may provide treatment).

(1976); *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977); *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

These cases do more than adumbrate the scope of the onstitutional right to privacy. They explicitly recognize the constitutional importance of full and unregulated communication between doctor and patient in the abortion context. Indeed, in both *Akron* and *Thornburgh* this Court distinguished sharply between state law restrictions that would promote full and accurate medical advice and those that would inhibit such advice. *Akron*, 462 U.S. at 445-47; *Thornburgh*, 476 U.S. at 759-65. The Title X counseling and referral restrictions at issue inhibit rather than promote informed decisionmaking; they explicitly limit the information and medical choice available to patients.

In addition to the decisions of this Court, there are numerous state court decisions in which information regarding pregnancy and childbirth have been deemed to be within a physician's duty to disclose. For example, in *Berman v. Allan*, 80 N.J. 421, 431-33, 404 A.2d 8, 13-15 (1979), the New Jersey Supreme Court found a physician liable for failing to inform parents of a child born with Down's Syndrome of the amniocentesis procedure that would have detected the condition at a time when the pregnancy could have been aborted. Later, in *Schroeder v. Perkel*, *supra*, the same court held that a doctor who had failed to disclose to his patient that her first child had cystic fibrosis and that there was a high risk that additional children might have the disease could be sued when the patient's second child was born with the disease. In both cases, the New Jersey Supreme Court emphasized the physician's duty to provide information that would have affected the mother's decision whether to respond to a pregnancy by the alternative of childbirth or abortion.[10]

[10] *See also Phillips v. United States*, 566 F. Supp. 1 (D.S.C. 1981) (United States liable in tort for failure of staff at navy medical hospital to give adequate genetic counseling to pregnant patient who subsequently gave birth to infant with Down's Syndrome); *Smith v. Cote*, 128 N.H. 231, 513 A.2d 341 (1986) (holding doctor liable for negligent failure to disclose rubella in pregnant mother, where child was born with congenital deformities and mother would have had an abortion had she known of risk of birth defects caused by rubella during pregnancy); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975) (same); *Dumer v. St. Michael's Hospital*, *supra* (same).

E. Title X Restrictions on Counseling and Referrals Infringe the Liberty Interest of Patients in Making Informed Medical Decisions.

It is undisputed that the Title X regulations governing counseling and referrals interfere with the ability of physicians in Title X projects to disclose relevant medical information to their patients, and the corresponding liberty interest of the patients to receive that information. The regulations prohibit physicians at Title X projects even from mentioning abortion as a medical treatment or from identifying providers of abortion services. *See* 42 C.F.R. § 59.8(a)(1) (projects "may not provide counseling concerning the use of abortion as a method of family planning"); *id.* at § 59.8(a)(3) (prohibiting Title X projects from providing referral lists including "health care providers whose principal business is the provision of abortion").

In some cases, the bar against providing full medical information to patients will put patients at serious medical risk. To take only the most obvious example, pregnant women with certain complicating conditions (such as diabetes, hypertension, and cancer) may face serious health risks if they continue the pregnancy. *See* Brief *Amici Curiae* of the American College of Obstetricians and Gynecologists *et al.*, *Rust v. Sullivan* (Nos. 89-1391, 89-1392). Yet, counseling with respect to pregnancy termination would be precluded by the regulations in such

cases save when an "emergency" exists. *See* 42 C.F.R. § 59.8(a)(2).[11] Many situations involving such health risks would not technically satisfy the definition of "emergency," which is left vague but appears from the examples in the regulation to be limited to situations like an ectopic pregnancy. *See* 42 C.F.R. § 59.8(b)(2).

There are many scenarios in which the Title X regulations would compel a physician to violate his or her legal and ethical obligations to provide patients facing particular health risks with full and accurate information about medical treatment options. Furthermore, it is important that the obligation to impart relevant information concerning pregnancy options is not limited to cases involving health risks but rather, as the guidelines of the American College of Obstetricians and Gynecologists state, applies to all medical decisions. The Title X regulations severely restrict such counseling. It would be difficult to imagine a more flagrant interference with a patient's right to accurate and complete information.[12]

II. NO STATE INTEREST JUSTIFIES THE INFRINGEMENT OF PATIENT LIBERTY INTERESTS CAUSED BY TITLE X COUNSELING AND REFERRAL REGULATIONS.

Once a "liberty interest" under the due process clause has been established, "whether [a party's] constitutional rights have been violated must be determined by balanc-

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[11] The regulations provide that "[i]n cases in which emergency care is required, however, the Title X project shall be required only to refer the client immediately to an appropriate provider of medical services." *Id.*

[12] That health care professionals working at Title X projects would not themselves perform medical procedures does not make the counseling prohibition any less intolerable. As discussed above, a physician's failure properly to counsel or to refer patients on whom a medical procedure ultimately will or should be performed by another is inconsistent with standards of informed consent.

ing his liberty interests against the relevant state interest." *Cruzan*, 58 U.S.L.W. at 4920 (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)). This analysis, in turn, depends on the interests asserted by the government. The government cannot identify a state interest sufficient to justify withholding from patients medically necessary information.

The government has not to this point argued that, as a general matter, patients are better off with incomplete medical information. Nor has the agency suggested that it has an especially compelling interest in denying information only to poor women, who are the principal beneficiaries of Title X assistance. The sole governmental interest offered in support of the counseling and referral regulations is the government's wish to promote childbirth and discourage abortion. This asserted interest is insufficient to justify so severe an infringement of patient interests in full disclosure of medical options.

By restricting the advice and information that physicians can legally provide to their patients, the Title X counseling and referral regulations seriously impair patient's rights to full and accurate medical information and make it virtually impossible for them to give their informed consent. Through the Title X program, the Department of Health and Human Services (HHS) establishes physician-patient relationships. By initiating such a relationship of trust and then barring the physician from providing full information, the government creates new obstacles to the patient's exercise of her right to make informed medical decisions. First, in the medical doctor-patient relationship, the patient places ultimate trust in the quality of the information received from the physician, and relies on that information being complete. *See* J. Katz, *The Silent World of Doctor and Patient* 142-47 (1984). Moreover, because patients in the Title X projects generally have no other source of professional medical advice, they are especially reliant on receiving full disclosure.

The Title X regulations are in fact so intrusive that they verge on constituting intentional deception. To a substantial degree, the advice poor women receive and rely upon will be that of the federal government, not the independent medical judgment of their doctor. This turns traditional notions of the inviolability of the doctor-patient relationship on their head. Worse yet, in many cases, patients will not realize that they have been given incomplete information.

There is no precedent for prohibiting the flow of information concerning any treatment—whether it be abortion, antibiotics, or surgery—that is generally regarded as medically indicated under appropriate circumstances and whose performance is legal under those circumstances. While the government may assert a variety of interests to support various types of regulation of individual medical decisions, a baseline constitutional principle should be this: There is no substantial governmental interest in limiting medical information about medical procedures that are regarded as legitimate under prevailing medical standards. The government's claimed interest in this case simply does not support its heavy-handed imposition of restrictions on counseling and referral, when weighed against a patient's fundamental liberty interest at stake.

III. THE CONSTITUTION PROHIBITS FUNDING RESTRICTIONS THAT IMPAIR A PATIENT'S RIGHT TO FULL AND ACCURATE MEDICAL INFORMATION.

As the foregoing demonstrates, the federal government may not constitutionally intrude upon the sanctity of the physician-patient relationship by directly prohibiting physicians and health care professionals from informing their patients about all their valid treatment options. It is equally true that the Constitution bars indirect governmental efforts to reach this same result.

The government has argued that the Title X regulations are not subject to constitutional constraints because Title X is merely a funding program and does not directly regulate private conduct. But as this Court has repeatedly observed, "even though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not act. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . ." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). *See also Speiser v. Randall*, 357 U.S. 513 (1958).

Contrary to this established precedent, the Second Circuit concluded that the Title X counseling and referral restrictions could be sustained under authority of *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980). We disagree for two reasons. First, from a first amendment perspective, there can be little question that the Title X regulations constitute an impermissible viewpoint-based restriction on speech. The regulations specifically target speech "concerning the use of abortion as a method of family planning," 42 C.F.R. § 59.8(a)(1), and, as such, fall afoul of the Constitution. *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *FCC v. League of Women Voters*, 468 U.S. 364 (1984).[13]

Second, when seen in the light of the doctrine of informed consent and patient liberty interests in full medical disclosure, the Title X counseling and referral restrictions far exceed anything approved in *Maher* or *McRae*. Both *Maher* and *McRae* involved cases in which the federal government adopted a passive position, choosing not to support particular conduct or speech. But in

---

[13] We concur with, and defer to, the more comprehensive treatment of this issue in briefs filed by petitioners and other *amici* in support of petitioners.

this case, HHS has affirmatively intervened in doctor-patient relationships to the detriment of the patients.[14]

The saving distinction drawn in *Maher* was between "direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." 432 U.S. at 475 (footnote omitted). Similarly, in *McRae* the court observed that "although government may not place obstacles in the path of" an individual's exercise of constitutional rights, "it need not remove those not of its own creation." 448 U.S. at 316.

In sharp contrast to these cases, Title X counseling and referral regulations constitute a "direct state interference with a protected activity." These regulations do not merely favor childbirth over abortion. They require physicians to give partial, misleading medical *information* in direct contravention of their ethical and legal obligations, placing at least some patients in a worse position than if there had been no Title X funding at all. It therefore cannot be said, in contradistinction to *Maher* and *McRae*, that the regulations leave Title X patients in "no worse position" than if no funds at all were provided.

---

[14] These cases are also distinguishable because they involved only the use of federal funds, whereas the challenged Title X regulations affect grantees' use of state and private funds as well. *See* 42 C.F.R. § 59.2 (1989) ("Title X project funds include all funds allocated to the Title X program, including but not limited to grant funds, grant-related income or matching funds."). This Court specifically cautioned in both *Maher* and *McRae* that its analysis would change if funding conditions burdened a recipient's ability to independently exercise her constitutional rights. *See Maher*, 432 U.S. at 474 n.8; *McRae*, 448 U.S. at 317 n.19.

CONCLUSION

The restrictions on counseling and referrals constitute an unprecedented effort by the government to exploit the traditional trust of the physician-patient relationship in order to steer needy women's health care decisions in the direction of a medical treatment favored by the government. In so doing, the government forces physicians and health care professionals in Title X projects to provide incomplete and thereby misleading medical advice, and thus to violate the most basic principles of medical ethics and common law. The government has no legitimate countervailing interest in interfering with patients' recognized liberty interest in making informed medical decisions.

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

CATHERINE L. FISK
DONOVAN LEISURE, ROGOVIN, HUGE & SCHILLER
1250 24th Street, N.W.
Washington, D.C. 20037
(202) 467-8300

MICHAEL E. FINE *
DOUGLAS W. SMITH
CLYDE SPILLENGER
POWELL, GOLDSTEIN, FRAZER & MURPHY
1001 Pennsylvania Avenue, N.W.
Sixth Floor
Washington, D.C. 20004
(202) 347-0066
Counsel for Amici Curiae

July 27, 1990

* Counsel of Record

APPENDIX

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APPENDIX

TWENTY-TWO BIOMEDICAL ETHICISTS * AMICI CURIAE

Frederick R. Abrams, M.D.
University of Colorado at Denver, Denver, CO

George J. Annas, J.D., M.P.H.
Boston University School of Public Health, Boston, MA

Ronald E. Cranford, M.D.
Hennepin County Medical Center, Minneapolis, MN

Rebecca Dresser, J.D.
Case Western Reserve University, Cleveland, OH

Sherman Elias, M.D.
University of Tennessee, Memphis, TN

Janet Fleetwood, Ph.D.
Medical College of Pennsylvania, Philadelphia, PA

Leonard H. Glantz, J.D.
Boston University School of Public Health, Boston, MA

Susan L. Goldberg, J.D.
Widener University School of Law, Wilmington, DE

Jane Greenlaw, J.D.
University of Rochester School of Medicine, Rochester, NY

Jay Katz, M.D.
Yale Law School, New Haven, CT

Carol Levine, Executive Director
Citizens Commission on AIDS, New York, NY

Joanne Lynn, M.D.
George Washington University, Washington, D.C.

Ruth Macklin, Ph.D.
Albert Einstein College of Medicine, Bronx, NY

---

* Note: Institutional affiliations listed for identification only.

Wendy K. Mariner, J.D., M.P.H.
Boston University School of Public Health, Boston, MA

Donald N. Medearis, Jr., M.D.
Massachusetts General Hospital, Boston, MA

Robert M. Nelson, M.D.
University of California at San Francisco,
San Francisco, CA

Lois LaCivita Nixon, Ph.D., M.P.H.
University of South Florida, Tampa, FL

Rochelle N. Shain, Ph.D.
University of Texas Health Science Center,
San Antonio, TX

Marjorie M. Shultz, M.A.T., J.D.
Boalt Hall School of Law, University of California,
Berkeley, CA

Jeffrey Spike, Ph.D.
University of Rochester School of Medicine, Rochester, NY

Judith P. Swazey, Ph.D., President
The Acadia Institute, Bar Harbor, ME

Herman S. Wigodsky, M.D., Ph.D.
University of Texas Health Science Center,
San Antonio, TX

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CLERK

Nos. 89-1391, 89-1392

IN THE

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v.

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[Counsel Listed on Inside Cover]

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BRUCE J. ENNIS, JR.*
DAVID W. OGDEN
THERESA A. CHMARA
JENNER & BLOCK
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 223-4400
Counsel for Amici
American Library Association,
Freedom to Read Foundation,
People for the American Way,
National Education Association,
The Newspaper Guild,
National Writers' Union, and
Fresno Free College Foundation

* Counsel of Record

July 27, 1990

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INTEREST OF AMICI

The American Library Association ("ALA") was founded in 1876 as a nonprofit, educational organization committed to preservation of the library as a resource indispensable to the intellectual, cultural, and educational welfare of the Nation. ALA is the oldest and largest library association in the world and the chief voice of the modern library movement in North America. ALA's membership includes more than 3,000 libraries and more than 47,000 individuals, primarily librarians. Many of ALA's member libraries are, and many of its member librarians serve, state or federally subsidized institutions.

The Freedom to Read Foundation ("Foundation") is a non-profit organization established in 1969 by ALA to promote and defend First Amendment rights; to foster libraries as institutions fulfilling the promise of the First Amendment for every citizen; to support the right of libraries to include in their collections and make available to the public any work they may legally acquire; and to set legal precedent for the freedom to read of all citizens.

The second article of the Library Bill of Rights, adopted by the ALA Council and subscribed to by both of these *amici*, is pertinent to the regulations at issue:

> "Libraries should provide materials and information presenting all points of view on current and historical issues. Materials should not be proscribed or removed because of partisan or doctrinal disapproval."

The Secretary's regulations governing Title X programs transgress this non-discrimination principle by prohibiting health care professionals and other Title X personnel—some in libraries and educational resource centers—from discussing abortion, providing patients with information about abortion, or providing referrals to clinics offering abortion counseling and services.

People for the American Way is a nonpartisan, education-oriented citizen's organization established to promote and protect civil liberties and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to the Nation's heritage of tolerance and pluralism, People for the American Way now has 290,000 members nationwide. The organization's primary mission is to educate the public on the vital importance of the democratic tradition and to defend it against attacks from those who would seek to limit our fundamental freedoms, particularly our First Amendment rights.

The National Education Association (NEA) is a nationwide employee organization with a current membership of over two million members, the vast majority of whom are employed by public educational institutions. NEA operates through a network of affiliated organizations; it has state affiliated organizations in each of the 50 States and approximately 12,000 local affiliates in individual school districts, colleges and universities throughout the United States. One of the principal purposes of NEA and its affiliates is to protect the constitutional rights of educational employees, including their First Amendment right of free speech.

The Newspaper Guild (AFL-CIO, CLC) is a labor union representing some 40,000 employees of newspapers, magazines, wire services and related enterprises in the United States, Canada, and Puerto Rico. It has been actively involved in protecting the First Amendment rights of its members and all Americans.

The National Writers' Union (NWU) is a seven-year old organization dedicated to improving wages and working conditions for writers as well as fighting for free speech issues that have an impact on NWU's members. Representing 3,000 writers nationwide, some of whom work for publicly-funded agencies, the NWU views with deep concern any attempt, by governmental regulation or

other means, to restrict free speech or to control the flow of information.

The Fresno Free College Foundation is a community organization with offices in Fresno, California. It was founded in 1968 in connection with an academic freedom case. Since then, it has, in various ways, supported academic freedom and the civil liberties of students, professors, and citizens, and the preservation of a free and open society through free inquiry and the free expression of ideas.

These *amici*—active supporters and defenders of First Amendment rights—share a strong interest in ensuring that the public has access to an unbiased and uncensored flow of information. In addition, *amici*—some of whose members are recipients of public funding—have a vital interest in protecting recipients of public funds from censorship through the power of the purse.

The parties have consented to the filing of this *amici curiae* brief. Their letters of consent are on file with the Clerk of this Court.

INTRODUCTION

The Department of Health and Human Services has promulgated regulations that prohibit recipients of Title X funds from providing information to their patients about abortion and from providing abortion counseling of any kind. 42 C.F.R. §§ 59.1 *et seq.* *Amici* strongly agree with the First Circuit that these regulations violate the First Amendment. *Commonwealth of Massachusetts v. Secretary of Health & Human Services*, 899 F.2d 53 (1st Cir. 1990). The Second Circuit, however, has upheld these regulations. *State of New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989).

The importance of the constitutional principles at issue is dramatized if they are considered in the context of

America's publicly-funded libraries.[1] Libraries are essential to the intellectual, cultural, and educational welfare of the Nation precisely because they make available to the public the full spectrum of information and opinion without censorship based upon authors' views. Libraries *per se* do not express opinions, but they do, without favoritism, make available books, magazines, and other materials that express opinions, often in very strong terms. Thus, a library would not advocate abortion. But if asked by a pregnant woman wanting information about abortion, about the options available to her, or about places where she might obtain an abortion, a library would provide her the materials she seeks. Such materials might well "counsel" or even advocate abortion in particular circumstances (or counsel against or discourage abortion). In this respect, the role of the library is comparable to that of a physician or other health care provider, among whose responsibilities is providing information about medical choices sought by patients.

Fulfillment of this function by libraries is crucial to the flourishing "marketplace of ideas" celebrated in this Court's fundamental First Amendment jurisprudence. But despite the tradition of "freewheeling inquiry" in America's libraries, *Board of Educ. v. Pico*, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting), libraries occupy a perilous niche in our society: most of our libraries are publicly-funded institutions subject to state control not only through the police power but also through the power of the purse.[2] If not insulated by the First Amendment

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[1] An identical point could be made if subsidized colleges or universities, or public school systems, were considered.

[2] Funding for public libraries through the Library Services and Construction Act alone exceeds one hundred million dollars. *See generally* Library And Book Trade Almanac, at 280-310 (35th ed. 1990-91). Similarly, federal and state governments expend billions of dollars to fund universities, colleges, public schools, art programs, publicly owned theatres, and public broadcasting. The potential to skew public opinion—if government is permitted to

from viewpoint-based manipulation of public funds, as well as from viewpoint-censorship administered in the more traditional form of regulations and criminal laws, the precious tradition of free inquiry and discovery safeguarded and promoted by America's libraries, as well as its schools and other institutions, will become a thing of the past.

If the Secretary may constitutionally prohibit doctors and other health professionals in subsidized family planning clinics from providing abortion counseling, abortion referrals, and all information about abortion—despite the tradition in these professions of unfettered expression of professional judgment in the patient's best interest—then government may also prohibit libraries and other institutions dependent on public funding from making that same information available in material maintained on library shelves.[3] And if these regulations survive constitutional review, federal and state governments will be free to impose unabashed viewpoint-based discrimination on other institutions, essential to the Nation's system of free expression, that receive public funds —such as colleges, universities and public school systems.

Censorship of information that can be dispensed by health care professionals, libraries or other public insti-

condition receipt of funds on propounding one point of view—is almost unlimited and extremely dangerous.

[3] Indeed, Title X recipients with libraries or educational resource centers to which their patients have access are *directly* subject to the regulations. For instance, Planned Parenthood Association of Utah (a plaintiff in a similar case pending before the Tenth Circuit) has an Educational Center, funded by Title X, that houses a library containing books, films and publications covering a broad spectrum of topics related to family planning that also mention or discuss abortion. *Planned Parenthood Fed'n of Am. v. Bowen, appeal pending*, No. 88-7251 (10th Cir.), Brief of Plaintiffs-Appellees, at 5 (Dec. 22, 1988). Presumably, Title X prohibits this library from lending books, pamphlets or other information regarding abortion to patients or individuals who request them.

tutions also compromises the First Amendment rights of the patients and other individuals seeking access to such information. Individuals dependent on public institutions for information on matters of public concern should not be denied access to competing points of view because of governmental disapproval of those views.

There can be no doubt that viewpoint censorship would compromise the traditional function of libraries and other institutions that receive public funds—just as the regulations at issue compromise the traditional function of health care professionals in the regulated clinics. Unless this Court strongly reaffirms the principles, directly at stake here, that government may not discriminate based upon *viewpoint* in dispensing subsidies for expressive activities, and that government may not *penalize* a speaker for the *privately*-funded exercise of his or her constitutional right to speak, there will be a serious diminution in the quality of information available, not only to impoverished pregnant women, but to all Americans.

SUMMARY OF ARGUMENT

Above all else, the First Amendment forbids government from discriminating among speakers and speech on the basis of viewpoint. Thus, officials may neither manipulate access by the public to government-owned expressive forums in order to advance or disadvantage particular points of view, nor manipulate subsidies for expressive activity for that improper end. The Secretary's Title X regulations discriminate for purely political reasons against pro-abortion viewpoints and in favor of anti-abortion viewpoints, without regard for regulated health-care professionals' judgment about which information and counseling would be in their particular patients' best interests. This viewpoint-based discrimination is just as unconstitutional as would be viewpoint-based restrictions on a public library's collection or on the history curriculum at a private university that accepts federal subsidies. Point I.

Even if the regulations were deemed to be viewpoint-neutral, they nevertheless violate the First Amendment by banning discussion by health care professionals and their patients of a topic—abortion—directly and inextricably bound to the treatment and related discourse authorized by Title X. Point II.

Moreover, it is well-established that government may not deny a subsidy as a consequence of disfavored *privately*-funded speech. By prohibiting Title X recipients from providing information about abortion, except at separate facilities with separate personnel, and by forbidding Title X recipients from referring family-planning patients to the separate facility if the "principal" business at that facility is providing abortion, the regulations unreasonably interfere with and deter protected expression. This penalty on privately-funded speech about abortion violates the First Amendment. Point III.

ARGUMENT

I. THE SECRETARY'S PROHIBITION ON DISCUSSION, COUNSELING AND REFERRAL FOR ABORTION SERVICES CONSTITUTES VIEWPOINT DISCRIMINATION VIOLATIVE OF THE FIRST AMENDMENT.

The First Amendment and the Equal Protection Clause of the Fourteenth Amendment generally forbid government from considering or acting on the basis of the *content* of constitutionally protected expression. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229-31 (1987); *Police Dep't of Chicago v. Mosely*, 408 U.S. 92, 95-96 (1972). Even in the few narrow circumstances in which this general principle does not apply fully,[4] this

[4] *See, e.g., Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 805 (1985) ("nonpublic forum" for communicative activities); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (zoning for adult theaters).

Court has preserved the "essence" of the content-neutrality rule by demanding "*absolute neutrality* by the government" with respect to "*the point of view* being expressed." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 67 (1976) (emphasis added). Above all else, the First Amendment requires that government not discriminate on the basis of viewpoint.[5]

Viewpoint-based discrimination—which strikes "at the very heart of constitutionally protected liberty"[6]—has been forbidden in a broad array of contexts.[7] In public

[5] *See, e.g., Cornelius*, 473 U.S. at 806 ("the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses"); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985) (Easterbrook, J.) ("The state may not ordain preferred viewpoints. . . . The Constitution forbids the state to declare one perspective right and silence opponents."), *aff'd*, 475 U.S. 1001 (1986).

[6] *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 688 (1959).

[7] *See, e.g., Niemotko v. Maryland*, 340 U.S. 268, 272 (1951); *id.* at 284 (Frankfurter, J., concurring) (access to public parks); *Tinker v. Des Moines Ind. Community School Dist.*, 393 U.S. 503, 511 (1969) (expression by students in public school); *see Young v. American Mini Theatres, Inc.*, 427 U.S. at 64, 67, 70 (zoning restrictions on adult motion picture theaters); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48-49 (1986) (same); *Members of the Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding an ordinance prohibiting the posting of signs on public property because the ordinance was viewpoint-neutral); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 546 (1980) (Stevens, J., concurring) (a law "motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law abridging the freedom of speech' "), quoted with approval, *FCC v. League of Women Voters*, 468 U.S. 364, 383-84 (1984); *Carey v. Brown*, 447 U.S. 455 (1980) (residential picketing); *City of Madison, Joint School Dist. v. Wisconsin Employment Relations Comm'n.*, 429 U.S. 167, 175-76 (1976) ("To permit one side of a debatable public question to have a monopoly in expressing its views . . . is

schools, perhaps uniquely among governmental institutions in the United States, the inculcation of values is an express and legitimate purpose. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988). But in *Board of Educ. v. Pico*, 457 U.S. 853 (1982), which involved a public school library, although the Justices disagreed about the *application* of the viewpoint-neutrality principle to the particular facts of that case, at least *eight* Justices recognized that the First Amendment is infringed if officials remove books from a public school library based upon the officials' disagreement with the ideas expressed in those books.[8] Thus, so antithetical is governmental viewpoint discrimination to the core values of a free society that this Court has rejected it even in the context of public school libraries.

Lower courts, both before and after *Pico*, have also held that viewpoint discrimination is forbidden in public

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the antithesis of constitutional guarantees."); *American Council of the Blind v. Boorstin*, 644 F. Supp. 811 (D.D.C. 1986) (prohibiting viewpoint discrimination in funding of the books for the blind program of Library of Congress).

[8] *See Pico*, 457 U.S. at 871 (Brennan, J., joined by Marshall, J., Blackmun, J., and Stevens, J.) ("If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution") (emphasis in original); *id.* at 877 (Blackmun, J.) ("the State may not suppress exposure to ideas—for the sole *purpose* of suppressing exposure to those ideas—absent sufficiently compelling reasons") (emphasis in original); *id.* at 883 (White, J., concurring in the judgment) ("the reason or reasons underlying the school board's removal of the books" is "a material issue of fact that precluded summary judgment" in school board's favor); *id.* at 919 (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting) (agreeing that Constitution does not permit the official suppression of ideas; in the public school context, " 'the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible' ").

school libraries.[9] Prohibitions on viewpoint discrimination in the context of a school library are entirely appropriate; the school library is an indispensable complement to the student's education by supplementing with a variety of viewpoints the more directed curriculum of educators. And because viewpoint discrimination is prohibited in public *school* libraries, the ban on viewpoint-based discrimination applies *a fortiori* to public libraries and private libraries and educational resource centers receiving public funding.[10]

Indeed, there are numerous decisions prohibiting viewpoint discrimination when government aids private speech *outside* the school context. Specifically, the Court has consistently recognized that permitting viewpoint-based discrimination when government aids or facilitates expression by private citizens or organizations would pose

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[9] *See, e.g., Minarcini v. Strongville City School Dist.*, 541 F.2d 577 (6th Cir. 1976); *Sheck v. Baileyville School Comm.*, 530 F. Supp. 679 (D.Me. 1982); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703 (D. Mass. 1978); *Cf. Pratt v. Independent School Dist.*, 670 F.2d 771 (8th Cir. 1982) (motion picture); *Brown v. Board of Regents*, 640 F. Supp. 674 (D. Neb. 1986) (same); *Bell v. U-32 Bd. of Educ.*, 630 F. Supp. 939 (D. Vt. 1986) (school play). *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), is not to the contrary; in that case this Court relied heavily on the value-inculcative role of public schools in controlling *curriculum*. *See, e.g., id.* at 271-72.

[10] Such libraries are unequivocally places for "freewheeling inquiry," *Pico*, 457 U.S. at 915 (Rehnquist, J., dissenting), and quintessentially government forums for the free communication of *all* ideas. Viewpoint censorship in the publicly-funded library violates the rights of both speaker and listener. Library users have a fundamental right of access to information free from governmental viewpoint censorship. *Cf. Pico*, 457 U.S. at 866-67 (Brennan, J.); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Martin v. Struthers*, 319 U.S. 141, 143 (1943). Patients in public health programs have similar interests.

intolerable dangers to free expression. Thus, when bestowing "seals of approval," *see, e.g., Healey v. James*, 408 U.S. 169, 187 (1972), government must be viewpoint neutral. And directly pertinent to the present case, viewpoint-based discrimination is also prohibited in government-created "non-public" forums for expression, and in government programs subsidizing private speech. Prohibiting governmental viewpoint discrimination in Title X family planning clinics is required by these precedents and *essential* to the preservation of a free marketplace of ideas and the perpetuation of a system of expression that is free from official orthodoxy.

Where government facilities are lent to private speakers, the Constitution invariably prohibits discrimination that is in reality an effort "to suppress expression merely because public officials oppose the speaker's view." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *see Cornelius*, 473 U.S. at 800, 806-13. For the same reasons, the First Amendment also prohibits viewpoint discrimination in subsidy programs. *Subsidizing* speech activity, like providing a *place or an audience* for a speaker, involves granting government property (money or land) to support speech by private parties. For all relevant purposes, a government program subsidizing a speech activity is a program that creates a (non-public) government forum. Identical interests are present in both subsidy and government property cases: the individual's interest in reaching an audience with the assistance of government, and government's interest in ensuring that its property is preserved for its intended use. Identical dangers to First Amendment interests are posed if government uses its property—whether real estate or money—to benefit or disadvantage particular viewpoints, or individuals with particular points of view.[11]

[11] It is clear that the viewpoint-neutrality rules apply to government forums whether or not they have a physical situs. *See Cornelius*, 473 U.S. at 800-801; *see also Perry Educ. Ass'n, supra* (holding that school's internal mail system was a forum notwithstanding that an internal mail system lacks physical situs); *Bolger v. Youngs Drug Prods. Co.*, 463 U.S. 60 (1983) (applying public forum analysis to the United States mails).

It is also clear that the viewpoint-neutrality requirement applies equally to government forums in which government subsidizes private speech. For example, the Combined Federal Campaign ("CFC") at issue in *Cornelius* involved a subsidy, and the Court of Appeals for the District of Columbia Circuit nevertheless applied forum analysis. *NAACP Legal Defense and Educ. Fund, Inc. v. Devine*, 727 F.2d 1247, 1254, 1255-56 (D.C. Cir. 1984), *rev'd on other grounds, Cornelius, supra*. In *Cornelius*, this Court did not even mention the fact that the CFC involved a subsidy, while holding that it was a nonpublic forum. Many lower courts have applied forum analysis in the context of a government subsidy. *See, e.g., Bazaar v. Fortune*, 476 F.2d 570 (5th Cir.), *mod. on other grounds*, 489 F.2d 225 (1973) (*en banc*), *cert. denied*, 416 U.S. 995 (1974); *Lee v. Board of Regents*, 441 F.2d 1257 (7th Cir. 1971).

This Court has repeatedly made clear that although government has no obligation to subsidize speech in the first place, if it *chooses* to subsidize speech it may not discriminate on the basis of the viewpoint expressed. In fact, the tax subsidy decisions of this Court suggest that even viewpoint-neutral *content* discrimination is impermissible when government subsidizes speech. *See* Point II, *infra*.[12] The outer contours of the prohibition on any *content*-based restrictions may be unclear, *see infra*, but it is indisputable that the government may not discriminate on the basis of the *viewpoint* of the speaker. In *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946), for example, this Court ruled that the Postmaster General could not deny second-class mailing privileges to publications he considered "morally improper." Such a denial, the Court held, would be "abhorrent to our traditions," and raise "grave constitutional questions." *Id.* at 151,

[12] There is no material distinction between a tax subsidy and a cash subsidy for purposes of determining access to a government forum and for applying the rule of viewpoint neutrality. *Regan v. Taxation With Representation*, 461 U.S. 540, 544 (1983).

155-56. *See United States ex rel. Milwaukee S.D. Pub. Co. v. Burleson*, 255 U.S. 407, 431 (1921) (Brandeis, J., dissenting) (viewpoint-based denial of a subsidy unconstitutional; claim that such a denial did not infringe constitutional rights termed "technical and insubstantial").

More recently, in *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), this Court considered whether a complicated tax scheme that permitted veterans' groups to use tax-deductible contributions for lobbying activities but denied other tax-exempt organizations this privilege, violated the First and Fifth Amendments. The Court concluded that the distinction did not violate the Constitution because the disparate treatment of organizations was not based upon the other organizations' views or the content of their speech. The Court warned, however, that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'aim at the suppression of dangerous ideas.'" *Id.* at 548. Thus, the Court upheld the tax scheme only because there was "no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect." *Id. Regan* strongly suggests that viewpoint-based discrimination in subsidy programs is forbidden by the First Amendment. *Cf. Cornelius*, 473 U.S. at 800, 806-13 (same standard in government forum cases). Post-*Regan* opinions reaffirm the prohibition of viewpoint discrimination in subsidy cases.

In *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986), for example, the Court struck down a statute that subsidized only one side of a debate, because "[t]his kind of favoritism goes well beyond the fundamentally content-neutral subsid[y] that we sustained in . . . *Regan*," *id.* at 14-15. The Court distinguished *Regan* and other cases upholding viewpoint-*neutral* denials of certain subsidies.

Dissenting in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), Chief Justice (then Justice) Rehnquist, the author of *Regan*, reemphasized the principle that viewpoint restrictions may not be imposed by the government when it subsidizes speech. The Chief Justice cautioned that any restrictions on the government's subsidies must not be "'aimed at the suppression of dangerous ideas,'" *id.* at 407 (*quoting Cammarano v. United States*, 358 U.S. 498, 513 (1959)). He argued that the FCC subsidy should have been upheld because it was "strictly neutral" and "[i]n no sense [could] it be said that Congress ha[d] prohibited only editorial views of one particular ideological bent." *Id.* at 407. Similarly, dissenting in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 237 (1987), Justice Scalia argued that the tax subsidy at issue should have been upheld notwithstanding its *content*-based discrimination, but he indicated that viewpoint discrimination in subsidy programs would violate the First Amendment: "Perhaps a more stringent, prophylactic rule is appropriate, and can consistently be applied, when the subsidy pertains to the expression of a particular viewpoint on a matter of public concern . . . ." [18]

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[18] Information relating to abortion is clearly a matter of *public concern*, particularly in light of the bitter and controversial nature of the public debate surrounding abortion issues.

The lower courts have ruled viewpoint-based discrimination to be unconstitutional in subsidy cases outside the abortion-related context. *See, e.g., Big Mama Rag, Inc. v. United States*, 631 F.2d 1034 n.7 (D.C. Cir. 1980); *Esquire, Inc. v. Walker*, 151 F.2d 49, 50 (D.C. Cir.), *aff'd on other grounds sub nom. Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946); *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973); *Brown v. Board of Regents*, 640 F. Supp. 674 (D. Neb. 1986); *American Council of the Blind v. Boorstin*, 644 F. Supp. 811 (D.D.C. 1986); *Spencer v. Herdesty*, 571 F. Supp. 444 (S.D. Ohio 1983); *Greenberg v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979); *Toward A Gayer Bicentennial Comm. v. Rhode Island Bicentennial Foundation*, 417 F. Supp. 632 (D.R.I. 1976); *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970); *Brooks v. Auburn Univ.*, 296 F. Supp. 188 (M.D. Ala.),

The Secretary's regulations clearly impose viewpoint-based restrictions on the speech of Title X recipients. If a health care professional in a clinic is asked a direct question about abortion by a pregnant patient, the regulations prohibit the professional from providing any information whatsoever, from referring her to a source of information about abortion, and from encouraging abortion in any other way. 42 C.F.R. § 59.8(b)(4). The regulations further instruct that the professional may only respond: "[t]he project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." *Id.* at § 59.8 (b)(5). This is viewpoint-based discrimination.

In addition, the regulations *mandate* the provision of "information necessary to protect the health of mother and *unborn child* until such time as the referral appointment is kept." *Id.* at § 59.8(a)(2) (emphasis added).[14] They *mandate* inclusion on any referral list of "providers who do *not* provide abortions." *Id.* at § 59.8(a)(3) (emphasis added). But the regulations *prohibit*: provision of "counseling concerning the use of abortion as a method of family planning or . . . referral for abortion," § 59.8 (a)(1); provision of a referral list including programs

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aff'd, 412 F.2d 1171 (5th Cir. 1969); *Smith v. Tennessee*, 300 F. Supp. 777 (E.D. Tenn. 1969).

This Court's opinions in *Lyng v. International Union*, 485 U.S. 360 (1988), *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), are not in conflict with this principle. None of those cases dealt with a viewpoint-based restriction on First Amendment rights. The First Amendment claims rejected in *Lyng* were not that the denial of the subsidy was based upon viewpoint, but rather that denial indirectly affected associational rights, forcing alteration of family relationships to continue to receive food stamp benefits. Likewise, *Maher* and *Harris* were concerned with the denial of public funds for abortion, not with restrictions on expressive activity about abortion.

[14] Thus, the regulations mandate provision of prenatal counseling, encouraging the woman to carry the fetus to term.

"whose principal business is provision of abortion," § 59.8(a)(3); and development or dissemination "in any way" of "materials (including printed matter and audio-visual materials) advocating abortion as a method of family planning." § 59.10(b)(5).

Without question, the Secretary has prohibited views "of one particular ideological bent," *League of Women Voters*, 468 U.S. at 407 (Rehnquist, J., dissenting), and has mandated communication of his own ideological perspective on the medical issues facing doctors and their pregnant patients. Indeed, in suppressing certain views and information while compelling *anti*-abortion speech and referrals, the regulations create an official orthodoxy with regard to discussion of abortion, wholly inimical to the "fixed star in our constitutional constellation . . . that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion." *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624, 642 (1943).

The viewpoint-based discrimination at issue here is particularly repugnant to the First Amendment for three reasons. First, the restriction is wholly unrelated to the traditional functions performed by health care personnel in programs such as those funded under Title X. The basic purpose of such programs is to provide citizens of limited means with the benefits of the expertise and judgment of professionals that is not otherwise within their reach. Health care professionals have a noble tradition and ethical rules of longstanding requiring members to provide information and counsel in the patient's best interest. Restricting professionals' freedom to provide information or advice they believe, in their professional judgment, is in their patients' best interests—and prohibiting them from providing information specifically requested by their patients—seriously undermines that tradition.

Second, prohibitions based not on the medical or health-related views of the government, but on "politics," is particularly indefensible. *See State of New York v. Sullivan*, 889 F.2d 401, 418 (2d Cir. 1989) (Kearse, J., dissenting) (quoting government counsel from transcript of oral argument).[15]

Third, viewpoint discrimination in a program of central importance to poor women threatens "suppression of . . . ideas," *Regan*, 461 U.S. at 548, to an extent far greater than that entailed in the typical speech-subsidy program. For many poor women, there may be no realistic alternative to Title X-funded family planning programs.[16] Prohibiting a pregnant woman from receiving at the Title X clinic information the Secretary deems politically undesirable, and prohibiting the clinic from referring her to another program that *would* provide that information, would either deny her access to that information, or delay access until it is too late for her to act on it. *State*

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[15] The First Amendment "command[s] the conclusion that the [government] may not act to deny access to an idea simply because . . . officials disapprove of that idea for partisan or political reasons." *Pico*, 457 U.S. at 879 (Blackmun, J., concurring in part and concurring in the judgment). *Any* viewpoint restriction on public libraries would be inconsistent with their function as facilitators of "freewheeling inquiry," *Pico*, 457 U.S. at 915 (Rehnquist, J., dissenting). And any viewpoint restrictions on professors at universities receiving federal grants would similarly be inconsistent with the historic role of universities as places of unfettered discourse and inquiry and the tradition of academic freedom. *See Keyishian v. Board of Regents of New York*, 385 U.S. 589, 603 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Weiman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring). Neither such restrictions, nor the regulation at issue here, could possibly survive the strict judicial scrutiny appropriate to laws restricting speech.

[16] Ninety percent of the patients utilizing Title X programs have incomes substantially below the poverty line. *Commonwealth of Massachusetts v. Secretary of Health & Human Services*, 899 F.2d 53, 56 (1st Cir. 1990).

of New York v. Sullivan, 889 F.2d 401, 417 (2d Cir. 1989) (Kearse, J., dissenting).

II. EVEN VIEWPOINT-NEUTRAL EXCLUSION OF SPEECH ABOUT A PARTICULAR SUBJECT MATTER FROM GOVERNMENT SUBSIDY PROGRAMS VIOLATES THE FIRST AMENDMENT, WHERE, AS HERE, THAT EXCLUSION IS INCONSISTENT WITH THE TRADITIONAL FUNCTION OF THE SUBSIDIZED PROGRAMS AT ISSUE.

Government censorship of subsidized programs may be constitutionally objectionable even if *not* viewpoint-based. The Court has held that *content* discrimination is unlawful in the context of a tax subsidy program. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229-231 (1987). *Ragland* holds that a State may not—consistent with the principles of the First Amendment—provide a tax exemption based on the *content* of a magazine. Such selective taxation is "particularly repugnant to First Amendment principles [because] a magazine's tax status depends entirely on its *content*." *Id.* at 229 (emphasis in original). In the subsidy context, therefore, "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an *entire topic*." *Id.* at 230 (emphasis added), *quoting Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 537 (1980).

Applied directly to this case, *Ragland* would be dispositive even if this Court determined that the Secretary has banned discourse on a *topic*—abortion—rather than discriminating against pro-abortion views. Subsidizing programs that discuss prenatal care, but excluding those that discuss abortion as well, violates the content-neutrality command of *Ragland*.

Amici recognize that this content-neutrality principle could conceivably give way to non-viewpoint restrictions

on speech by recipients of public funds where that speech is directly contrary to the compelling purpose of the program at issue. Arguably, public health programs could be restricted to discussing topics *pertinent* to their charge.[17] But patients rely on their physicians and other health care professionals to provide them with *comprehensive* information and counsel regarding their medical options and the medical resources available to them. It is indisputable that the topic of abortion is inextricably bound with prenatal care and family planning. Women seek medical care, assistance and advice from Title X clinics with regard to contraception and a variety of medically related health care needs. Frequently, a patient's initial visit to a Title X clinic is for the purpose of getting a pregnancy test. *Commonwealth of Massachusetts v. Secretary of Health & Human Services*, 899 F.2d 53, 56 (1st Cir. 1990). The topic of abortion is obviously intimately related to the topics of pregnancy and prenatal services about which the patients seek public health assistance. By prohibiting Title X health care professionals and other recipients of public funding from providing their pregnant clients and patients with *any information* about abortion—even in response to direct and specific questions—the Secretary has for reasons extraneous to health care prohibited the discussion of a health care topic that is inextricably related to the speech the program authorizes.

In sum, the Secretary cannot impose content-based restrictions that prohibit health care providers from dispensing medical advice and information to pregnant patients about abortion. Such restrictions on the content of the advice or information that a health care professional may provide are inconsistent with the basic function of the Title X program—to provide medical services, counseling and referral with regard to family planning and related medical conditions such as pregnancy—and, therefore, contravene the First Amendment.

[17] Programs such as libraries that by tradition or dedication have been free from subject matter censorship, however, may not be subjected to legislative limitations on the subjects they address.

III. BY IMPOSING CUMBERSOME AND IN MANY CASES UNREALISTIC REQUIREMENTS OF PHYSICAL SEPARATION BETWEEN PRIVATELY FUNDED PROVISION OF INFORMATION ABOUT ABORTION SERVICES AND PUBLICLY FUNDED FAMILY PLANNING SERVICES, THE REGULATIONS IMPOSE A PENALTY ON PROTECTED SPEECH VIOLATIVE OF THE FIRST AMENDMENT.

It is well-established that government may not deny a subsidy based upon a group's or individual's privately funded expressive activities.[18] Thus, for example, government may not deny public broadcasting funds to local stations that use their own funds to present broadcast editorials, even though government might be permitted to deny public funding for the editorials themselves. *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984); *see Regan v. Taxation With Representation*, 461 U.S. 540, 553 (1983) (Blackmun, J., concurring).

This Court has recognized that, consistent with this principle, government may require recipients of federal funds to segregate their publicly-funded from their

[18] *See FCC v. League of Women Voters*, 468 U.S. 364, 400-01 (1984); *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958); *Perry v. Sinderman*, 408 U.S. 593, 597 (1972). *Cf. Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980) (denial of welfare benefits for abortion is constitutional, but an attempt to withhold *all* welfare benefits from one who exercises right to an abortion probably would be impermissible); *Maher v. Roe*, 432 U.S. 464, 474-75 n.8 (1977) (same). Government may, of course, simply decline to subsidize expressive activity, so long as it does not do so in a manner that *penalizes* such activity. *See Cammarano v. United States*, 358 U.S. 498, 513 (1959); *Grove City College v. Bell*, 465 U.S. 555, 575 (1984); *Regan v. Taxation With Representation*, 461 U.S. 540, 553 (1983) (Blackmun., J., concurring).

privately-funded expression, and to require bookkeeping practices to ensure that no federal funds are used for a prohibited purpose. *Regan*, 461 U.S. at 544 n. 6; *see id.* at 553 (Blackmun, J., concurring); *League of Women Voters*, 468 U.S. at 395. But it is crucially important that this refinement, crafted for the convenience of government, not undermine the constitutional rule: measures requiring more expensive and burdensome steps than bookkeeping, like denying the subsidy itself, would impose an undue penalty on that protected, privately-funded expression. *See League of Women Voters*, 468 U.S. at 395; *Regan v. Taxation With Representation*, 461 U.S. at 553 (Blackmun, J., concurring).

In at least two respects, the regulations transgress this rule against penalizing protected expression. Although the regulations permit Title X recipients to engage in the forbidden speech about abortion with private funds, they are unequivocal that "[m]ere bookkeeping separation of Title X funds from other monies is not sufficient." 42 C.F.R. § 59.9. By requiring, in addition, physical separation of privately- and publicly-funded facilities and separate personnel, § 59.9(a-d), the regulations impose expensive burdens on recipients of Title X monies that unconstitutionally force them, if they wish to engage in speech about abortion with private funds, to choose between forfeiting the federal subsidy on the one hand or incurring significant expense on the other.[19]

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[19] *See Commonwealth of Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53, 74 (1st Cir. 1990) ("The practical effect of the regulations is to restrict significantly the ability of the recipient organization to engage in the forbidden counseling, even on its own time with its own money."). Moreover, because federal funds may never amount to 100% of the funds utilized by the Title X program, and often account for only half of the program's operating budget, the regulations prohibit speech about abortion with the privately-contributed private funds. *See* 42 C.F.R. § 59.2 ("Title X project funds include all funds allocated to the Title X program, including but not limited to grant funds,

Indeed, the regulations' unconstitutional effect goes even further than merely *penalizing* Title X recipients for engaging in the disfavored speech; they may make it literally impossible for a recipient to provide abortion counseling or information concerning abortion with private funds to their own patients. If a patient at the Title X facility asks for abortion counseling, information concerning abortion, or referral to a program that provides such counseling or information, the regulations prohibit the recipient from referring that patient even to its own physically separate facility if that facility "principally provides abortions" or would "encourage" or "steer[]" a patient to programs that provide abortion. 42 C.F.R. § 59.8.[20] Thus, although the recipient may say whatever it wishes at its separate facility to anyone who learns of its existence, the recipient may not inform its Title X patient that the information she seeks is available at the separate facility. As this Court observed in *Ragland*, "'[i]t hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him.'" *Ragland*, 484 U.S. at 231, *quoting Regan*, 461 U.S. at 553 (Blackmun, J., concurring); *Virginia Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 757 n. 15 (1976). Similarly, it hardly answers the Title X recipient's objection to being prevented from communicating with its patient about abortion—or the patient's objection that information she seeks on that subject has been suppressed—that

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grant-related income or *matching funds*.") (emphasis added); *id.* at 59.11(c) ("No grant may be made for an amount equal to 100 percent of the Title X project's estimated costs."); *see also Commonwealth of Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53, 73 n.11 (1st Cir. 1990) ("the government, at oral argument, said that the federal government provides only about 50% of the money supporting federally funded family planning projects").

[20] Such a referral would almost certainly be deemed an "indirect means" of promoting abortion. 42 C.F.R. § 59.8(a)(3).

the Title X recipient would be free to provide that information to other patients at its separate facility.

Because the regulations deny Title X subsidies to programs that use private funds to provide abortion information to patients seeking that information, they violate the fundamental principle that "government may not deny a benefit to a person *because* [that person] exercises a constitutional right." *Regan*, 461 U.S. at 545 (emphasis added).

CONCLUSION

Amici respectfully urge this Court to reverse the judgment of the Court of Appeals for the Second Circuit, and hold that the regulations of the Secretary of Health and Human Services, 42 C.F.R. §§ 59.7-59.10, violate the First Amendment.

Respectfully submitted,

BRUCE J. ENNIS, JR.*
DAVID W. OGDEN
THERESA A. CHMARA
JENNER & BLOCK
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 223-4400
Counsel for Amici
American Library Association,
Freedom to Read Foundation,
People for the American Way,
National Education Association,
The Newspaper Guild,
National Writers' Union, and
Fresno Free College Foundation

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* Counsel of Record

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DR. IRVING RUST, on behalf of himself, his patients, and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

THE STATE OF NEW YORK, THE CITY OF NEW YORK, THE NEW YORK CITY HEALTH & HOSPITALS CORP.,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONERS

CONRAD K. HARPER
Counsel of Record
JANICE GOODMAN
DIANE S. WILNER
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 West 44th Street
New York, New York 10036
(212) 382-6600

DEBORAH M. BUELL
DONNA COSTA
JOSEPH RAVITCH
CLEARY, GOTTLIEB, STEEN & HAMILTON
One Liberty Plaza
New York, New York 10006
(212) 225-2000
Attorneys for Amicus Curiae The Association of the Bar of the City of New York

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INTEREST OF AMICUS[1]

The Association of the Bar of the City of New York (the "Association") is an organization of over 18,000 lawyers. While most members practice in the New York City metropolitan area, the Association has members in nearly every state and in forty countries. Two important purposes of the Association, as set forth in its Constitution, are "promoting reforms in the law" and "facilitating and improving the administration of justice."[2] The Association accordingly has devoted itself to supporting and defending reforms in the law in cases of

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1 Letters of consent to the filing of this brief are being filed with the Clerk of the Court pursuant to Rule 37.3 of the Rules of this Court.

2 Constitution of the Association of the Bar of the City of New York, Art. II.

substantial public importance before the courts.

The Association is committed to the right of freedom of expression and believes that the challenged regulations[3] abridge the free speech rights of both health care professionals and their clients. The Association views a restriction of this nature, promulgated in this manner, as an alarming precedent for professionals who provide any form of counsel, as well as for the general public. Indeed, many lawyers, because they are employed by government-funded

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3 The challenged regulations, 42 C.F.R. § 59, 53 Fed. Reg. 2,922 et seq. (1988) (hereinafter the "Regulations"), were adopted by the Secretary of the United States Department of Health and Human Services (hereinafter the "Secretary") pursuant to Title X of the Public Health Service Act, 42 U.S.C. §§ 300 et seq. (1982 & Supp. 1986) (hereinafter "Title X").

entities, may fear the imposition of analogous restraints on their freedom fully to advise their clients as required by state law and ethical obligations.

The Association is equally committed to the principle of individual liberty, including the constitutional right of women to make reproductive decisions, in consultation with their physicians, free from governmental coercion. The Association believes that, by imposing content-based restrictions on health care professionals' advice to their clients, the Regulations effectively deprive women of information necessary to exercise their constitutional right of reproductive choice.

These issues are of great significance to the Association. The Association, through its Committees on

Civil Rights and Medicine and Law,[4] therefore urges that the order of the Court of Appeals of the Second Circuit upholding the Regulations be reversed.

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4 Conrad K. Harper, President of the Association of the Bar of the City of New York; Janice Goodman, Chair of the Committee on Civil Rights; Diane S. Wilner, Chair of the Committee on Medicine and Law.

SUMMARY OF ARGUMENT

By censoring the information that Title X providers may give to their clients, the Regulations impermissibly violate the First Amendment rights of health care professionals by placing content-based restrictions on professional/client communications, thereby interfering with the confidential relationship between health care professionals and their clients. By employing its administrative rule-making power to promulgate the Regulations in contravention of both the intent of Congress and the First Amendment rights of professionals, the Secretary has exceeded the scope and purpose of Title X and has illegally intruded upon the health care field.

ARGUMENT

THE REGULATIONS VIOLATE THE FIRST AMENDMENT RIGHTS OF HEALTH CARE PROFESSIONALS

A. The Censorship Prescribed By The Regulations Violates The First Amendment's Prohibition Against Content-Based Speech Restrictions

1. The Regulations Violate The First Amendment By Prohibiting Discussion Of Abortion

The First Amendment expressly forbids the government from restricting expression because of "its message, its ideas, its subject matter, or its content." Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (city ordinance prohibiting non-peaceful picketing found unconstitutional). See Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980) (content-based regulation of speech is violative of the First Amendment). The dissemination of information about

abortion in particular is a protected form of speech. Bigelow v. Virginia, 421 U.S. 809 (1975) (advertisement of abortion services is a form of expression protected by the First Amendment).[5]

It is not disputed that, under the Regulations, Title X providers are forbidden to speak about abortion. Even if a client asks for factual information about abortion, the professional may not provide such information or refer her to any source of abortion-related

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5 See also YWCA of Princeton v. Kugler, 342 F. Supp. 1048 (D.N.J. 1972) (statute forbidding a physician from prescribing or advising a woman to terminate her pregnancy chills First Amendment freedoms), aff'd, 493 F.2d 1402 (3d Cir.), cert. denied, 415 U.S. 989 (1974); Planned Parenthood of Chicago Area v. Kempiners, 568 F. Supp. 1490, 1495 (N.D. Ill. 1983) (statute denying funds to agencies providing abortion counseling and referral with private funds impermissibly penalizes free speech rights).

information.[6] Instead the client must be told only "that the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." 42 C.F.R. § 59.8(b)(5), 53 Fed. Reg. at 2,945. Thus, the Secretary has expressly censored all discussion of abortion by health care professionals receiving Title X funds. Such a prohibition, on its face, violates the First Amendment right

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6 The Regulations' ban of the word "abortion" from the Title X provider's office arguably has the absurd effect of preventing health care professionals who receive Title X funds from providing their clients with a local telephone reference directory. New York v. Sullivan, 889 F.2d 401, 415 (2d Cir. 1990) (Cardamone, J., concurring); id. at 416-17 (Kearse, J., dissenting in part).

of free speech of these health care professionals.[7]

2. The Regulations Violate The First Amendment By Requiring Title X Providers To Communicate An Anti-Abortion Message To Their Clients

The Regulations not only prohibit health care professionals from counseling women about abortion and providing abortion referrals when requested, 42 C.F.R. § 59.8(b)(5), 53 Fed. Reg. at 2,945, but compel anti-

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7 Furthermore, it is not the case, as the court below implies, New York v. Sullivan, 889 F.2d at 412, that the Regulations apply only to the use of federal funds. No Title X project is completely funded by federal monies. 42 C.F.R. § 59.11(c). Title X providers are required to receive nonfederal funds equal to at least 10% of the amount provided through Title X. 42 U.S.C. § 300a-4. In fact, federal funds account for only 50% of the monies received by Title X projects. Massachusetts v. Secretary of Health and Human Services, 899 F.2d 53, 59 (1st Cir. 1990). Thus, the Regulations restrict speech paid for by private as well as public monies.

abortion referrals.[8] Thus, in addition to violating the First Amendment's prohibition against content-based speech restrictions, the Regulations violate this prohibition by impermissibly regulating speech on the basis of an anti-abortion viewpoint.

Constitutional principles dictate that the allocation of public funds may not be motivated by the desire to suppress "unacceptable" lawful ideas while subsidizing "acceptable" ones. FCC v. League of Women Voters, 468 U.S. 364,

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8 The Regulations direct that health care professionals provide pregnant women with information regarding prenatal medical care necessary to protect the health of the "mother" and "unborn child," even when the woman has announced her intention to obtain an abortion, 42 C.F.R. § 59.8(a)(2), 53 Fed. Reg. at 2945, and require that all pregnant women be provided with a list of providers of prenatal care who do not perform abortions. Id. at § 59.8(a)(3), 53 Fed. Reg. at 2938.

383-84 (1984). Through Title X, the government funds the discussion of pregnancy and reproductive health between health care professionals and poor women. Having opened this forum for discussion, the government must maintain strict viewpoint neutrality and ensure that the information given therein is nondiscriminatory. Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 800 (1985).

In FCC v. League of Women Voters, 468 U.S. 364, 383-84 (1984), this Court struck down a ban on editorializing by publicly-funded radio stations because the ban was "motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest . . . ." Id. (quoting Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 546

(1980) (Stevens, J., concurring)). Similarly, the Court should strike down the Secretary's attempt to prohibit communications which a health care professional might believe, in his or her professional judgment, is warranted by the client's circumstances, but which the Secretary feels furthers an "unacceptable" viewpoint.

The Regulations cannot be analogized to the government's failure to subsidize the performance of abortions. See Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989); Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977). Although, according to recent decisions of this Court, the government is free to choose which medical services it will fund, id., the government cannot use its funding power to override the First Amendment

rights of health care professionals. The above-cited funding cases do not sanction any interference with the First Amendment rights of these professionals.[9] The Regulations, however, do not merely deny funding for certain medical care, but also force health care professionals to communicate one-sided, government-prescribed information in contravention of their rights of free speech.

"[W]here the State's interest is to disseminate an ideology, no matter

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9 Webster, Harris and Maher did not address the constitutionality of a funding scheme which regulated the speech of health care professionals. However, in Webster, four Justices noted that if the statute had been interpreted by the state to "prohibit publicly employed health professionals from giving specific medical advice to pregnant women," a serious constitutional issue would have been raised. 109 S. Ct. at 3060 (O'Connor, J., concurring); id. at 3068-69 n.1 (Blackmun, Brennan and Marshall, JJ., concurring in part and dissenting in part).

how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such a message." Wooley v. Maynard, 430 U.S. 705, 717 (1977). By censoring the information that Title X providers may give to their clients, the Regulations impermissibly compel health care professionals -- viewed by their clients as the source of accurate, impartial medical information -- to act as the mouthpiece for the Secretary's disapproval of abortion.

The government created and funded Title X programs expressly to provide a forum for the dissemination of family planning information. The Regulations, however, impose a viewpoint bias on the communications between Title X providers and their clients by funding only those health care professionals who

undertake to express views acceptable to the government. The government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech." Perry v. Sindermann, 408 U.S. 593, 597 (1972). See also Sherbert v. Verner, 374 U.S. 398, 405 (1962) ("conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms"). The Regulations impermissibly condition the receipt of a government benefit -- the Title X funds -- on the surrender of the constitutional right to free speech and thereby violate the First Amendment rights of health care professionals.

3. The Speech Prohibited By the Regulations Warrants Particularly Strong Protection Because It Involves Communications Between Health Care Professionals And Their Clients

The violation of the First Amendment's prohibition against content-based speech restrictions is particularly egregious in this case because the Regulations interfere with confidential communications between health care professionals and their clients. The Regulations not only abridge First Amendment rights but substantially interfere with the goals of the health care profession. There is no greater assault on the practice of sound health care than a regulation which restricts free and open communication of lawful medical options between health care professionals and their clients and

thereby effectively compels these professionals to violate their own professional standards.[10]

As in the attorney/client relationship, an essential aspect of the physician/patient relationship is the

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10 The Regulations would be analogous to a government regulation prohibiting a criminal defense lawyer who is paid with funds appropriated by the Criminal Justice Act, 18 U.S.C. §§ 3006A, et seq. (1985), from counseling his client about his Fifth Amendment right to refuse to testify on the grounds that his testimony may tend to incriminate him. Certainly, for the government to condition a grant of funding to lawyers on the deliberate withholding of advice concerning a course of action which is not only lawful, but constitutionally protected, would not only violate the First Amendment rights of individual lawyers but also would constitute a dangerous assault on the integrity of the legal profession as a whole. However, this is precisely the kind of unacceptable restriction which the Regulations impose on health care professionals practicing in the area of family planning.

ability of the physician and patient to speak openly and freely with one another with the guarantee that the content of their communications will remain confidential.[11] Under the cloak of confidentiality, a physician must provide appropriate counseling and seek informed consent for treatment.

The duty of health care professionals to their clients is no different when the information concerns abortion and its alternatives. Indeed, because of the particularly important

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11 "The candor which [the promise of confidentiality] elicits is necessary to the effective pursuit of health; there can be no reticence, no reservation, no reluctance when patients discuss their problems with their doctors." Hammonds v. Aetna Cas. and Sur. Co., 243 F. Supp. 793, 801 (N.D. Ohio 1965); cf. Hickman v. Taylor, 329 U.S. 495, 510 (1947) ("it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion").

nature of the speech involved in communications between health care professionals and their female clients involving women's exercise of their constitutional right of reproductive choice,[12] this Court has consistently struck down laws that require health care professionals to disseminate biased or incomplete information about abortion. See Akron v. Akron Center for Reproductive Health Inc., 462 U.S. 416, 444-45 (1983) ("By insisting upon recitation of a lengthy and inflexible list of information [the statute] unreasonably has placed 'obstacles in the

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12 See Roe v. Wade, 410 U.S. 113, 165 (1973) (the abortion decision is "inherently, and primarily, a medical decision"); Akron v. Akron Center for Reproductive Health Inc., 462 U.S. at 443 ("It remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances.").

path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision.'") (citing Whalen v. Roe, 429 U.S. 589, 604 n.33 (1977)); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 762 (1986) (requirement that a physician provide a woman with a list of agencies offering alternatives to abortion is "nothing less than an outright attempt to wedge the [government's] message discouraging abortion into the privacy of the informed consent dialogue between the woman and her physician"). Like the statutes struck down in Akron and Thornburgh, the Regulations place an impermissible "straitjacket" on health care professionals and directly interfere with the delivery of information which is essential to the professional/client

relationship. Thornburgh, 476 U.S. at 762 (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 67 n.8 (1976)).

B. By Restricting Communications Between Health Care Professionals And Their Clients, The Regulations Represent An Unprecedented And Unauthorized Intrusion Of Federal Power Into The Health Care Field

In passing Title X, Congress did not intend either to restrict the First Amendment rights of health care professionals or to use appropriated funds as a means of regulating the medical profession. Neither the statute nor its legislative history demonstrates any congressional intent to interfere in the communications between professional and client. Notwithstanding the lack of congressional intent and direction, the Secretary has promulgated unprecedented rules which, as described above, have the direct effect of regulating the

physician/patient relationship in the area of reproductive choice. The Regulations are therefore invalid not only because they transgress established First Amendment freedoms, but because they represent an unprecedented and unauthorized intrusion of federal power into the health care field.

Where an administrative agency has exceeded its authority by promulgating regulations that are inconsistent with congressional intent and "contrary to the manifest purposes of Congress in enacting [the statute]," the regulations are invalid. United States v. Larionoff, 431 U.S. 864, 873 (1977). Here, in adopting Title X, Congress sought, among other things, to provide "comprehensive, voluntary planning services to all persons in the United States," Pub. L. No. 91-572, reprinted in

1970 U.S. Code Cong. & Admin. News (84 Stat. 1504) 1748, so as to "guarantee the right of the family to freely determine the number and spacing of its children with the dictates of its individual conscience." Preamble to S. 2108, 91st Cong., 2nd Sess., reprinted in Cong. Rec. 24093-94, (July 14, 1970). The Regulation directly contravenes the congressional purpose by converting Title X into a platform for dictating the government's view of family planning and by restricting the individual's ability to "freely determine the number and spacing of its children."[13]

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[13] The statutory basis offered by the Secretary for the Regulations is Section 1008, which forbids funding any program "where abortion is a method of family planning." 42 U.S.C. § 300a-6. This section clearly does not provide a basis for the restrictions on the communications between professionals and clients now at issue.

The scope of a health care professional's duty to communicate with his or her client has historically been determined through state law and professional self-regulation. Whether governed by state laws of informed consent,[14] or the obligations of professional ethics,[15] the health care

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14 See, e.g., N.Y. Pub. Health Law § 2805-d (McKinney 1985 & Supp. 1988) (requiring health care providers to inform patients of all risks and benefits of a particular mode of treatment); Cobbs v. Grant, 8 Cal.3d 229, 243, 502 P.2d 1, 10, 104 Cal. Rptr 505, 514 (1972) (recognizing a "duty of reasonable disclosure of the available choices with respect to proposed therapy").

15 American Medical Association, Principles of Medical Ethics 8.07 (1986) ("The physician's obligation is to present the medical facts accurately to the patient."); American College of Obstetricians and Gynecologists, Standards for Obstetric-Gynecological Services 76-77 (6th ed. 1985) (requiring, in the event of unwanted pregnancy, that physician counsel patient about her options, including the option of

profession has always provided whatever information is required in order for the patient to choose freely the appropriate treatment. The law and custom that protect professional/client communications are areas where the federal government has never sought to intervene.

Given the history of local and self-regulation of health care professionals and the absence of any indication by Congress that it intended to break with that history, it is clear that Congress has not affirmatively chosen to regulate physician/patient communications. Instead, the Secretary

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abortion); cf. New York State Bar Association, Lawyer's Code of Professional Responsibility, EC 7-8 ("A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations.").

has abused his rule-making power by intruding on the physician/patient relationship and placing unconstitutional content-based and viewpoint-based restrictions on the most important form of speech employed by the health care profession in a manner which Congress neither mandated nor envisioned.[16]

The Regulations, promulgated under a statute designed to fund family planning services for impoverished women, represent an illegal, as well as unwise, extension of bureaucratic, rule-making power beyond its appropriate sphere. Allowing the Secretary to promulgate these regulations would set a remarkable

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16 Congressman John Dingell, the sponsor of Section 1008, now suggests that the Secretary may have intentionally "misinterpret[ed] the congressional intent for Title X." Congressman J. Dingell, Letter to Otis Bowen (Oct. 14, 1987) at 2.

precedent for administrative agencies to exercise power not only to restrict protected speech but to dictate novel and uniform standards of care across an entire spectrum of professional activity which Congress has never before sought to occupy and certainly did not intend to invade in enacting Title X.

Conclusion

For the foregoing reasons, the Association, through its Committees on Civil Rights and Medicine and Law, urges this Court to reverse the decision of the Court of Appeals for the Second Circuit.

Respectfully submitted,*
Conrad K. Harper
Counsel Of Record
Janice Goodman
Diane S. Wilner
THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 West 44th Street
New York, New York 10036
(212) 382-6600

Deborah M. Buell
Donna Costa
Joseph Ravitch
CLEARY, GOTTLIEB, STEEN
& HAMILTON
One Liberty Plaza
New York, New York 10006
(212) 225-2000

Date: New York, New York
July 27, 1990

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IN THE

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OCTOBER TERM, 1990

DR. IRVING RUST, on behalf of himself, his patients, and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

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Petitioners,

v.

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF REPRESENTATIVES PATRICIA SCHROEDER, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

[Additional Amici Continued on Inside Cover]

DAVID M. BECKER *
JOAN M. GERHART
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000
Counsel for Amici Curiae

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* Counsel of Record

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TOM CARPER, WILLIAM CLAY, CARDISS COLLINS,
JOHN CONYERS, JR., GEORGE W. CROCKETT, JR.,
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MERVYN DYMALLY, DON EDWARDS,
THOMAS DOWNEY, ELIOT ENGEL, MIKE ESPY,
LANE EVANS, DANTE FASCELL, WALTER FAUNTROY,
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WILLIAM LEHMAN, SANDER LEVIN, MEL LEVINE,
JOHN LEWIS, RONALD MACHTLEY,
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MORRIS UDALL, JOLENE UNSOELD, HENRY WAXMAN,
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AND FORMER SENATOR GAYLORD NELSON

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

Nos. 89-1391, 89-1392

DR. IRVING RUST, on behalf of himself, his patients, and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

Petitioners,

v.

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

THE STATE OF NEW YORK, THE CITY OF NEW YORK, THE NEW YORK HEALTH & HOSPITALS CORP.,

Petitioners,

v.

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF REPRESENTATIVES PATRICIA SCHROEDER, OLYMPIA SNOWE, NITA LOWEY, BILL GREEN, *et al.** AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

This *amici curiae* brief is submitted in support of petitioners Rust, *et al.*, and the State of New York, *et al.* By letters filed with the Clerk of the Court, petitioners and respondent have consented to the filing of this brief.

INTEREST OF AMICI CURIAE

As members of Congress, *amici curiae* have a particular interest in ensuring that the departments entrusted with the implementation of statutory provisions correctly interpret those provisions. Specifically, *amici curiae* have an interest in ensuring that the Secretary of Health and Human Services properly construes and administers the provisions of Title X of the Public Health Service Act, 42 U.S.C. § 300 *et seq.* (1982 & West Supp. 1990).

INTRODUCTION

Nearly twenty years ago, Title X of the Public Health Service Act was enacted with broad bipartisan support and with a legislative compromise—section 1008—that balanced the contending views of various of the proponents of the program and the anti-abortion constituency. The family planning program was administered consistently for seventeen years, and Congress easily rebuffed the efforts of a few Members of Congress to enact the very restrictions at issue here.

Suddenly, the Secretary of Health and Human Services announced new regulations in a blatant effort to circumvent the intent of the statute and the political proc-

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* See inside front cover for full list of *amici*.

esses from which it derived. *Amici curiae* include many of the 148 Members of Congress who filed comments with the Secretary opposing this clear abuse of his rulemaking authority. Our interest in this case lies with the preservation of the integrity of a statute that, unless and until *the Congress* acts, is the law of the land.

SUMMARY OF ARGUMENT

We object to two features of the Secretary's new regulations: the prohibition on providing information through neutral, non-directive counseling concerning abortion and referral to abortion providers (section 59.8(a)) and the requirement that Title X programs be carried out in facilities that are physically separate from facilities in which abortion services are provided (section 59.9). As we explain in Point I, the Secretary's prohibition on abortion counseling and referral is utterly inconsistent with the language of Title X, including section 1008. In Point II we establish that, even if section 1008 is not expressed in clear, unambiguous language, the Secretary's new regulations are not based upon a permissible construction of that language. Finally, in Point III, we demonstrate that the Secretary's physical separation requirement is arbitrary and capricious.

ARGUMENT

I. THE UNAMBIGUOUS LANGUAGE OF TITLE X IS INCONSISTENT WITH THE SECRETARY'S REGULATIONS PROHIBITING GRANTS TO PROGRAMS THAT PROVIDE COUNSELING OR REFERRAL FOR ABORTION

The plain meaning of section 1008 is inconsistent with so much of the Secretary's regulations that prohibit nondirective abortion counseling and referral. An administrator has no discretion to "interpret" a statute when "Congress has directly spoken to the precise question at

issue" through the plain language of the statute. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 843 n.9 (1984).[1]

A. Section 1008 Prohibits the Use of Title X Funds Only for Programs in Which "Abortion" Is a Method of Family Planning

Section 1008 forbids the use of Title X funds "in programs where abortion is a method of family planning." By its terms, section 1008 prohibits the expenditure of Title X funds only for "abortion," not "abortion counseling" or "abortion referral."

The Secretary asserts that because Title X programs provide, *inter alia*, family planning information, "abortion" is a "method of family planning" in any program that provides information about or referral for abortion. While the Secretary's observation about the scope of Title X services is undoubtedly correct, that observation provides no premise for his conclusion.

The fact that Title X programs may provide information *about* family planning methods does not convert *the information* into a "method of family planning." Despite occasional resort to it, talk is simply not a "method of family planning." The Secretary's contrary reading of the statute finds no support in language or experience. To illustrate the fallacy of the Secretary's reasoning, a Title X program that aggressively counseled its clients *against* abortions would be one in which "abortion" is a "method of family planning" if the program also, no matter how grudgingly or disapprovingly, provided its clients with basic information about abortion. Under any natural reading of the statutory language, this cannot be.

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[1] "[N]o deference is due to agency interpretations at odds with the plain language of the statute itself." *Public Employees Retirement Sys. v. Betts*, 492 U.S. ——, 109 S. Ct. 2854, 2863 (1989); *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986).

The very absence of any mention of "abortion counseling" or "abortion referral" dispels any ambiguity as to the meaning of section 1008. As Title X is structured, section 1008 sets forth a limited exception to expenditures that, absent section 1008, would be otherwise plainly authorized by the statute.[2] Without compelling evidence to the contrary, it must therefore be presumed that what Congress did not specifically exclude from Title X's "comprehensive" services it necessarily knowingly authorized.[3]

This case is thus not like the usual one in which the absence of explicit mention of a matter in the statute suggests that Congress has "left a gap for the agency to fill [so that] there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron*, 467 U.S. at 843-44. To the contrary, the absence of explicit mention here means that Congress *has* resolved the issue, and that it is not one that was " 'committed to the agency's care by the statute.' " *Id.* at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)).

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[2] We do not understand there to be any dispute on this point. Nor could there be. Title X was enacted "to assist in making *comprehensive* voluntary family planning services readily available to all persons desiring such services." Pub. L. No. 91-572, § 2(1), 84 Stat. 1504 (1970) (emphasis added). Those comprehensive services were to include "medical, informational, and educational activities" related to family planning, population research and infertility services. H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. 8 (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News at 5082, Joint Appendix ("J.A.") at 70a (references to the Joint Appendix will be to the Joint Appendix for the briefs on the merits, "J.A. at —," or to the Joint Appendix for the Petition for Writ of Certiorari, "J.A. at —a").

[3] It is this principle that animates the general rule that statutory exceptions are to be read narrowly. *See, e.g., Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980). The rule of narrow construction is particularly appropriate in construing exceptions to remedial statutes such as Title X. *Piedmont & Northern Ry. v. ICC*, 286 U.S. 299, 311-12 (1932); *see* 3 N. Singer, *Statutes and Statutory Construction* § 64.08 at 217 (C.D. Sands 4th ed. 1986) (grant-in-aid statutes remedial in character).

Indeed, had Congress intended to prohibit abortion counseling, it would have done so in explicit terms, not by omitting to mention the subject with the hope that the Secretary would fill the statutory void. When counseling a patient about the various methods of contraception, a physician has an obligation to educate the patient about the risks, side effects, and failure rates of each method. Furthermore, the physician must, as a matter of competent medical practice, inform the patient of the available choices in the event of contraceptive failure, choices that include carrying the pregnancy to term, placing the child for adoption, and, whether the Secretary likes it or not, terminating the pregnancy.[4]

II. EVEN IF SECTION 1008 IS AMBIGUOUS, THE SECRETARY'S REGULATIONS ARE NOT BASED UPON A REASONABLE CONSTRUCTION OF THE STATUTE

A. The Secretary's Interpretation of Section 1008 Is Not Entitled to the Usual Deference

When the Court concludes that statutory language is ambiguous, it inquires whether an agency's proffered interpretation is "based on a permissible construction of the

[4] Affidavit of Irving Rust, M.D. (February 5, 1988), J.A. at 251 ("access to information about abortion is essential to the ability of a non-pregnant patient to give informed consent to her choice of contraceptive method. For many patients with diabetes, heart disease, or hypertension, oral contraceptives may present a serious health risk. It is imperative that I inform these patients that use of a diaphragm with the back-up of an early abortion is in fact the safest method of contraception, despite the lower effectiveness rate of the diaphragm versus the pill . . . No responsible family planning decision can be made without information about every alternative available, including that of abortion, in the event that contraceptive failure, occurs . . ."); Affidavit of Raymond Fink, (February 3, 1988), J.A. at 164 (physicians "will be unable to emphasize in a meaningful manner, the importance of family planning and responsible sexual behavior to patients because to do so requires discussion of the success and failure rates of all contraceptive modalities and how these affect one's ability to avoid unintended pregnancy and unwanted childbirth.").

statute." *Chevron*, 467 U.S. at 843 (footnote omitted). Although generally the Court accords "considerable weight" to the agency's construction, deferring to the agency's interpretation of its statutory mandate, *id.* at 842-44, the Court traditionally has refused to defer to an agency interpretation of statutory language if the interpretation is inconsistent with the agency's previous interpretation of the same language. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("An additional reason for rejecting the [Government]'s request for heightened deference to its position is the inconsistency of the positions the BIA has taken through the years.") (citations omitted).[5]

Although an agency may reexamine and correct prior positions and respond to changing circumstances,[6] when it reverses its position on a question of statutory interpretation, the Court declines to accord the new interpretation the same degree of deference enjoyed by a consistent, long-standing interpretation rendered contemporaneously with the enactment of the statute. This is because con-

[5] This is a time honored rule to which the Court faithfully has adhered both before and after its decision in *Chevron*. *See NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 124 n.20 (1987) ("We also consider the consistency with which an agency interpretation has been applied . . ") (citations omitted); *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 134 (1985) ("Here we are not dealing with an agency's change of position with the advent of a different administration, but rather with EPA's consistent interpretation since the 1970's."); *Watt v. Alaska*, 451 U.S. 259, 273 (1981) ("The Department's current interpretation, being in conflict with its initial position, is entitled to considerably less deference.") (citation omitted); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976) (refusing to follow agency guideline which "flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute."); *Morton v. Ruiz*, 415 U.S. 199, 237 (1974) (weight of the agency's interpretation dependent upon, *inter alia*, "its consistency with earlier and later pronouncements of an agency") (citation omitted); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

[6] *Chevron*, 467 U.S. at 863-64.

temporaneous administrative construction of a statute is highly persuasive evidence as to the statute's intended effect,[7] particularly where, as here, the agency charged with administering the law was active in the legislative process and, therefore, can be assumed to have especial knowledge of what the legislature intended.[8]

As we explain in greater detail below,[9] the Secretary's ban on abortion counseling and referral in Title X programs is a sharp departure from a long-standing administrative interpretation. As the Court of Appeals explained,

> There is little doubt that the new regulations were intended as a departure from prior administrative practice. While Title X funds were never permitted in the past to be used either to perform or to subsidize actual abortions, . . . administrative interpretations at first permitted, and later required, Title X projects to provide information about, and referral for, abortions, including names and addresses of abortion clinics . . . .

889 F.2d 401, 404 (2d Cir. 1989), J.A. at 42a (citations omitted). This complete reversal deprives the Secretary's

[7] *See EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

[8] *See United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982); *Miller v. Youakim*, 440 U.S. 125, 144 (1979). The Secretary of Health, Education and Welfare, the Assistant Secretary for Health and Scientific Affairs, the Deputy Assistant Secretary for Population Affairs, and the Director of the Office of Population and Family Planning were each highly active in the legislative process culminating in the enactment of Title X. *See, e.g., Family Planning Services: Hearing on H.R. 15159, H.R. 9107, H.R. 9108, H.R. 9109, H.R. 15691, H.R. 11123 and S. 2108 Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 84-5 (1970) (statement of Elliot L. Richardson, Secretary of Health, Education and Welfare) ("It is clear that the administration and the sponsors of S. 2108 have essentially the same goals, and we have worked closely with the Senate sponsors on this legislation in an effort to minimize our differences.").

[9] *See infra* at pp. 13-15.

new interpretation of Title X of the deference an administrator usually enjoys.[10]

B. The Secretary's Regulations Are Not Based Upon a Permissible Construction of Section 1008

The Court should reject the Secretary's interpretation of section 1008 as not "reasonable, in light of the language, policies, and legislative history" of the statute. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985).

1. *The Secretary's Interpretation of Section 1008 Thwarts the Overriding Purpose of Title X*

The Secretary's principal justification of his interpretation of section 1008 is unusual. He argues less that his interpretation is correct as a matter of statutory construction and more that it better effectuates the intention of Congress in enacting section 1008. 53 Fed. Reg. 2922, 2923 (1988). In so doing, the Secretary has disregarded the overall purpose and rationale of Title X, while misconceiving the more limited purpose of section 1008.

Title X is not an anti-abortion statute. It was enacted "to assist in making comprehensive voluntary family planning services readily available to all persons desiring such services." Pub. L. No. 91-572, § 2(1), 84 Stat. 1504 (1970). Those comprehensive services were to include "medical, informational, and educational activities" related to family planning, population research and in-

[10] Indeed, the Secretary's interpretation may be entitled to no deference at all. When faced with a "pure question of statutory construction," a question for the judiciary to decide, the Court need not defer to the agency. Rather, the Court resolves the issue for itself, "employing traditional tools of statutory construction." *Cardoza-Fonseca*, 480 U.S. at 446-47; *United Food & Commercial Workers Union*, 484 U.S. at 123; *see also Chevron*, 467 U.S. at 843 n.9 ("the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent").

fertility services. H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. 8 (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News at 5082, J.A. at 70a. Congress did not consider family planning to be "merely a euphemism for birth control." S. Rep. No. 1004, 91st Cong., 2d Sess. 10 (1970). Indeed, the Senate Report underlined that a "successful family planning program" should provide "consultation" and "referral to other medical services as needed." *Id.*

The history of Title X clearly supports the notion that, when properly construed, section 1008 allows Title X programs to achieve both Title X's goal of providing comprehensive information and section 1008's goal of prohibiting federal funding of abortion. When Title X was enacted, all states allowed abortions under at least some circumstances, and the clear trend was toward liberalized legalization.[11] Of course, the propriety of abortions was, and is, hotly disputed. In the course of hearings by the Subcommittee on Public Health and Welfare of the House Committee on Interstate and Foreign Commerce, several opponents of the legislation that became Title X expressed concern that its effect would be to fund abortions.[12]

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[11] Thirty-three states allowed abortions to save the life (or, sometimes, the physical health) of the woman; thirteen states allowed abortions when the pregnancy would endanger the physical or mental health of the woman, when the child would be born with grave physical or mental problems, and in cases of rape or incest; four states allowed abortions for any reason when performed by a licensed physician during the early stages of pregnancy. *See* Roemer, *Abortion Law Reform and Repeal: Legislative and Judicial Developments*, 61 Am. J. Pub. Health 500, 500-01 (March 1971). For discussion of the trend in the early 1970s toward liberalizing abortions laws, see 116 Cong. Rec. 10,278 (1970) (statement of Sen. Tydings on need to re-examine abortion laws); *id.* at 24,096 (statement of Sen. Packwood supporting liberalization of abortion laws); George, *The Evolving Law of Abortion*, 23 Case W. Res. L. Rev. 708 (1972); Note, *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems*, 1972 U. Ill. L. Forum. 177.

[12] *See, e.g., Family Planning Services: Hearing* at 240 (testimony of Mrs. D.R. Mogilka, Chairman, Reverence for Life of America); *id.* at 359 (testimony of Rev. James T. McHugh, Director, Family Life Division, U.S. Catholic Conference); *id.* at 369 (testimony of Mrs. R. Kuffel, National Coordinator of Civic Awareness of America); *id.* at 382 (testimony of Dr. John F. Hillabrand).

To meet these concerns, the full committee, at the behest of Representative John D. Dingell, added section 1008, entitled "Prohibition of Abortion." H.R. Rep. No. 1472, 91st Cong., 2d Sess. 4 (1970). The legislation was passed by the House in this form, and the Conference Committee adopted the House version. Significantly, the Conference Committee also described section 1008 as prohibiting "the use of [Title X] funds *for abortion*." H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. 8 (1970), J.A. at 70a (emphasis added).

The only extended explication of section 1008 was set forth in a revised and extended floor statement by Representative Dingell. The statement is explicit that the focus of section 1008 was the prohibition of abortions. It emphasized that a principal concern of Congress was to prevent Title X, through operation of the supremacy clause, from becoming the vehicle through which abortion was rendered legal nationwide.

> None of the 50 States currently sanction abortion as a method of family planning. The criminal codes of most States sanction abortion only in certain strict and clearly-circumscribed cases. Even the broadest interpretation of these laws would not lead one to the conclusion that they in any way allow for such a procedure as an accepted method of family planning. *For the Congress of the United States to appropriate funds for a procedure which would violate the criminal law of a vast majority of American jurisdictions would be to raise constitutional questions of a most serious nature. . . .*

116 Cong. Rec. 37,379 (1970) (statement of Rep. Dingell) (footnote omitted) (emphasis added).

Representative Dingell's lengthy statement, which we urge the Court to read in its entirety, makes no mention of abortion counseling or referral. Indeed, there is not a

single statement in any of the Title X committee reports or floor debates that mentions counseling or referral.[13]

Representative Dingell's reassurance that "abortion is not to be encouraged or promoted in any way through this legislation," 116 Cong. Rec. 37,375, meant, as Representative Dingell himself has confirmed,[14] no more than what he said—that the *effect* of Title X would not be to increase the availability of abortions.[15] There is no support for reading into that statement an otherwise unstated intent to preclude any mention of abortion during counseling or to preclude referral to other health care providers that could legally perform abortions in their state.

The Secretary's central justification for his actions is that providing neutral, factual information about abor-

[13] Subcommittee testimony by Monsignor Alphonse S. Popek, inveighing against abortion and abortion counseling, does not shed light on the meaning of section 1008. *Family Planning Services: Hearing* at 321-22. Msgr. Popek also opposed the bill in its final form, predicting that, as a result of the legislation, "[b]efore long 'life control' and 'death control' within each State of the Union will fall before the monstrous sovereign dictatorship of the Federal Government . . .," and that the "horrendous Hitlerian experiment, to propagate his superrace, will be repeated. . . ." 116 Cong. Rec. 37,383 (1970). The Court need not view Msgr. Popek's testimony as a reliable barometer of Congressional intent.

[14] Representative Dingell filed comments with the Secretary opposing the misreading of his statements. He emphasized that "[m]y remarks did not suggest—either expressly or implicitly—that the legislation being considered intended or required a prohibition on non-directive counseling or referral of pregnant women to abortion facilities." Comments of Chairman John D. Dingell, Committee on Energy & Commerce, on Proposed Rules 42 CFR Part 59—Fed. Reg. Notice, Sept. 1, 1987 (Oct. 14, 1987) at 2.

[15] In much the same way, statements by proponents of the pending legislation, such as Dr. Alan Guttmacher (also a leading proponent of the legalization of abortion), to the effect that one of the beneficial collateral consequences of Title X would be to reduce the number of abortions by reducing the number of unwanted pregnancies, cannot fairly be read as suggesting that the animating purpose behind Title X was to reduce the availability of abortions.

tion constitutes "encouragement" of abortion, and that the statute mandates ignorance instead. 53 Fed. Reg. 2923, 2933. The Secretary could not be more wrong. Congress emphatically rejected the notion that the provision of non-directive information constitutes "encouragement" or "promotion." Members of Congress repeatedly stressed that the very purpose of Title X was to enable "all individuals . . . to have the opportunity, within the dictates of their conscience, to exert control over their own life destinies." 116 Cong. Rec. 24,092 (1970) (statement of Sen. Eagleton).[16] Title X itself provides that "[t]he acceptance by any individual of family planning services . . . shall be voluntary." 42 U.S.C. § 300a-5 (1982). Congress sought to facilitate this voluntary action by providing accurate, comprehensive information. *See, e.g.*, 116 Cong. Rec. 37,388 (1970) (statement of Rep. Burke) (purpose of Title X is "to provide information, including educational materials . . . to enable people to do what their conscience dictates is proper or advisable in their own situation."); *id.* at 37,382 (statement of Rep. Rogers); *id.* at 37,375 (statement of Rep. Broyhill). By withholding information from Title X beneficiaries, the Secretary prevents them from making the truly informed, voluntary family planning decisions that Congress intended to facilitate.

2. *The Secretary's New Regulations Are Inconsistent with the Contemporaneous and Consistent Administrative History of Section 1008*

Not once, in the seventeen years after the enactment of Title X, did the Secretary even suggest that section

[16] *See also* 116 Cong. Rec. 37,375 (1970) (statement of Rep. Broyhill) ("[I] would like to emphasize that the programs involved here involve only voluntary family planning assistance. The record should be abundantly clear that it is not the intent of Congress that any such program should interfere with the religious or moral beliefs of individual Americans."); *id.* at 37,388 (statement of Rep. Matsunaga) ("We must be very careful to safeguard the religious and moral convictions of all of our citizens, and I am convinced that [Title X] does precisely that.").

1008 prohibited the provision of information about abortion or referral for abortion. The earliest regulations for the Title X program, issued in 1971, required that all Title X grantees provide "medical services related to family planning including . . . necessary referral to other medical facilities when medically indicated," and "social services related to family planning, including counseling. . . ." 36 Fed. Reg. 18,465, 18,466 (1971). Title X grantees were also required to make provision for "coordination and use of referral arrangements with other providers of health care services. . . ." *Id.* at 18,466.

Guidelines issued by the Secretary in 1976 and 1981 stated that abortion referral and counseling "*must* [be] provide[d]" by Title X recipients.[17] In 1978 the Secretary filed an *amicus* brief in the Eighth Circuit arguing that Title X *required* referrals, at least for medically-indicated abortions.[18]

Numerous interpretations within the Department were to the same effect. Only months after Title X was enacted, the Office of General Counsel expressed its understanding that section 1008 prohibited only the *provision* of abortions.[19] In 1976, the Office of Population Affairs

[17] Department of Health and Human Services, *Program Guidelines for Project Grants for Family Planning Services*, §§ 7.4, 8.0, 8.1 and 8.6 (1981), J.A. at 71a (emphasis added); *accord* Department of Health, Education and Welfare, *Program Guidelines for Project Grants for Family Planning Services* (Jan. 1976), J.A. at 72a.

[18] *See* Brief of the Secretary of Health and Human Services in *Valley Family Planning v. North Dakota*, 661 F.2d 99 (8th Cir. 1981), J.A. at 72a. That case held that a state statute's prohibition on using public funds for abortion referral violated the supremacy clause because it "[ran] afoul of Title X's mandate that comprehensive health care be provided." 661 F.2d at 102.

[19] *See* Memorandum from Joel M. Mangel, Deputy Asst. General Counsel, Department of Health, Education and Welfare, to Louis M. Hellman, M.D., Deputy Asst. Sec'y for Population Affairs (Apr. 20, 1971), J.A. at 35 (collection of data relating to subject of abortion would not violate section 1008 since it "does not itself involve the provision of abortions").

directed that, although section 1008 prohibited *directive* counseling on abortion, a counselor in a Title X program had "not only a First Amendment right but duty to inform a patient of *all legal options*." [20] The Department's consistent construction of section 1008 was summarized in a 1978 Office of General Counsel opinion, stating: "provision of information concerning abortion services, [or] mere referral of an individual to another provider of services . . . are not considered to be proscribed by § 1008." [21] Again, in 1979, the Department reiterated its position that "[t]he provision of information on abortion services and the mere referral of a patient to another provider for such a procedure are permissible." [22]

3. *Subsequent Actions by the Congress Are Consistent with the Contemporaneous Legislative and Administrative History*

Under settled principles, " 'Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change. . . .' " [23] This presumption is even greater when Congress reenacts the

[20] Letter from Louis M. Hellman, M.D., Deputy Asst. Sec'y for Population Affairs, to Hilary H. Connor, M.D., Regional Health Administrator (Nov. 19, 1976), J.A. at 74a (emphasis added).

[21] Memorandum from the Office of General Counsel, Department of Health, Education and Welfare (Apr. 14, 1978), J.A. at 73a.

[22] Memorandum from Louis Belmonte, Regional Program Consultant (May 25, 1979), J.A. at 75a; *see also* Memorandum from Department of Health, Education and Welfare (July 25, 1979), J.A. at 73a ("a [Title X] project *may*, consistent with section 1008, make 'mere referrals' for abortion") (emphasis in original).

[23] *Lindahl v. OPM*, 470 U.S. 768, 782 n.15 (1985) (citations omitted); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 382 n.66 (1982); *see also United States v. Rutherford*, 442 U.S. 544, 554 (1979) (citations omitted) (deference to an administrative interpretation of a statute "is particularly appropriate where . . . an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives.").

statute after the agency's construction has been "fully brought to [its] attention." [24]

Congress has been acutely aware of the Department's consistent interpretation of section 1008 and has reauthorized Title X six times since 1970 [25]. Moreover, during that time Congress repeatedly refused to enact legislation that would have overturned the Department's consistent interpretation.

a. *Congress Has Been Well Aware of the Department's Interpretation of the Statute*

Title X has been subject to unusually close scrutiny by Congress. *See, e.g.*, 121 Cong. Rec. 9,790 (1975) (statement of Sen. Cranston) ("The committee has also been watching the administration of these programs very closely."). In addition, agency reports and General Accounting Office ("GAO") audits have fully apprised Congress that Title X grants have been made to programs that counsel or refer for abortions.

As originally enacted, Title X required the Secretary to submit a "five-year plan" and annual progress reports to Congress setting forth goals for the program and a plan to reach those goals. Pub. L. No. 91-572, § 5, 84 Stat. 1504, 1505 (1970). The first five-year plan, submitted to Congress by the Secretary in October 1971,

[24] *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) (citations omitted); *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 599-601 (1983); *Kay v. FCC*, 443 F.2d 638, 646-47 (D.C. Cir. 1970) ("[A] consistent administrative interpretation of a statute, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has congressional approval.").

[25] Title X was reauthorized in 1973. Pub. L. No. 93-45, 87 Stat. 91. It was reauthorized again in 1975, Pub. L. No. 94-63, 89 Stat. 304, again in 1977, Pub. L. No. 95-83, 91 Stat. 383, again in 1978, Pub. L. No. 95-613, 92 Stat. 3093, again in 1981, Pub. L. No. 97-35, 95 Stat. 357, and again in 1984, Pub. L. No. 98-512, 98 Stat. 2409. *See also* H.R. Rep. No. 159, 99th Cong., 1st Sess. 2 (1985) (summarizing history). Since 1985 the Title X program has been funded through a series of continuing resolutions.

made clear that the Secretary interpreted section 1008 as prohibiting grants only to programs that actually performed abortions for contraceptive purposes.[26] The Secretary also recognized that "even the most effective contraceptives have failure rates which result in unwanted pregnancies and *some persons will seek assistance in terminating the pregnancy.*" [27]

In 1974 the House Committee on Interstate and Foreign Commerce noted that "[t]his [Five-Year] Plan and the annual reports submitted to Congress outlining progress toward filling its objectives have made possible Congressional evaluation of existing policies and practices in the field, and determination of the need for new ones." [28] The following year Congress amended Title X to require annual reports to the Congress on the Department's plans for the succeeding five years of the program.[29]

In addition to the annual reports, in 1981 Senators Orrin Hatch and Jeremiah Denton commissioned a special audit of the Title X program to see whether section 1008's prohibition against funding of abortions as a method of family planning was being properly enforced. The Comptroller General's report, issued the following year, expressly noted that the Department had long taken the position that a Title X grantee may:

—provide information about abortion services;

[26] *Report of the Secretary of Health, Education and Welfare Submitting Five-Year Plan for Family Planning Services and Population Research Programs for the Special Subcomm. on Human Resources of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess. 319 (1971).

[27] *Id.* at 82 (emphasis added).

[28] H.R. Rep. No. 1161, 93d Cong., 2d Sess. 15 (1974); *see also* H.R. Conf. Rep. No. 1524, 93d Cong., 2d Sess. 59 (1974) ("Congress has received an accurate view of progress from year to year, and local and Federal administrators have been able to evaluate program effectiveness rapidly and with precision.").

[29] Pub. L. No. 94-63, Title II, § 203(a), 89 Stat. 304, 307 (1975).

—provide the name, address, and the telephone number of abortion providers; . . .

—inspect facilities to determine their suitability to provide abortion services; and

—pay dues to organizations that advocate the availability of abortion services.[30]

The report contained the following conclusions:

—GAO found no evidence that title X funds had been used for abortions or to advise clients to have abortions.

—We did not find any evidence . . . that pregnant women were advised to have abortions.

—Clinic officials said they always emphasized a nondirective and unbiased approach to counseling pregnant women. Interviews with several counselors showed that they were aware of restrictions against encouraging or advising clients to have abortions.[31]

b. *Congress Repeatedly Has Reauthorized Funds for Title X*

Congress' consistent reauthorization of Title X, in light of the agency's understanding of its mandate, is persuasive evidence that Congress acquiesced in the agency's interpretation.[32] Indeed, the committees charged with enacting Title X (as opposed to appropriations committees) and overseeing its implementation are the very com-

[30] Report by the Comptroller General, *Restrictions on Abortion and Lobbying Activities in Family Planning Programs Need Clarification* 12 (Sept. 24, 1982), J.A. at 107.

[31] *Id.* at i, 16, 17, J.A. at 82, 112-14.

[32] Reauthorization without change of a federal grant statute, like other reenactments, is probative of legislative acquiescence in an existing interpretation. *See Grove City College v. Bell*, 465 U.S. 555, 568-69 n.19 (1984); *United States ex rel. TVA v. Two Tracts of Land*, 456 F.2d 264, 267 (6th Cir.) (repeated appropriations in face of objections to interpretation supported interpretation); *cert. denied*, 409 U.S. 887 (1972).

mittees responsible for reauthorizing it.[33] Congress has revisited Title X both in its oversight and its authorizing capacity and, by reauthorizing Title X, has accepted and extended the agency's contemporaneous construction of section 1008.

c. *Congress Repeatedly Has Refused To Enact Legislation that Would Impose the Restrictions the Secretary Now Seeks To Impose*

Between 1974 and 1975, Congress considered and rejected three amendments to Department of Health and Human Services appropriations bills that explicitly would have prohibited the use of federal funds for abortion referral services or for the promotion or encouragement of abortion. *See* 120 Cong. Rec. 21,687-95 (1974); *id.* at 31,452-58, 121 Cong. Rec. 20,863-64 (1975).

In 1978, Representative Robert Dornan repeatedly sought to amend section 1008 because it was not preventing Title X funds from being used for counseling and referral activities that included abortion as an option.[34]

[33] An "authorizing committee" is "a standing committee of the House or Senate with legislative jurisdiction over the subject matter of those laws, or parts of laws, that set up or continue the legal operations of Federal programs or agencies." G.A.O., *A Glossary of Terms Used in the Federal Budget Process* 39 (1981); *see also id.* at 5. Furthermore, as the Rules of the House of Representatives direct, "[e]ach standing committee (other than the Committee on Appropriations and the Committee on the Budget) shall review and study, on a continuing basis, the application, administration, execution, and effectiveness of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that committee and the organization and operation of the Federal agencies and entities having responsibilities in or for the administration and execution thereof, *in order to determine whether such laws and the programs thereunder are being implemented and carried out in accordance with the intent of the Congress and whether such programs should be continued, curtailed, or eliminated.*" Rules of the House of Representatives, 101st Cong., 2d Sess. X.2(b)(1) (1990) (emphasis added).

[34] To demonstrate how the Secretary had interpreted section 1008 and how Title X funds were being spent, Representative Dornan

These attempts were all defeated. 124 Cong. Rec. 37,044-48.[35] In 1985 Representative Jack Kemp and Senator Hatch also made unsuccessful attempts to add to the appropriations bill for Title X a provision specifically prohibiting abortion counseling and referral. 131 Cong. Rec. 28,166 (1985) (statement of Sen. Hatch).[36] The amendment, also, did not pass. Representative Kemp also tried to add language prohibiting use of Title X funds to refer pregnant women for abortions. *See Congressional*

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put in the record an extensive article that detailed the legislative history of section 1008 and that concluded "[t]here is apparently no basis, in light of the legislative history of Section 1008, for believing that the prohibition of Title X funds for 'abortion as a method of family planning' was intended to include a prohibition of the use of such funds for abortion counseling and referral. . . . In fact, it is apparent that Congress does not believe that the language of the [Act] prohibits abortion referrals or counseling, or even promotion or encouragement of abortion. . . ." 124 Cong. Rec. 31,243-44 (1978). Representative Dornan also noted that Department of Health and Human Services regulations "require referral for abortion, or abortive counseling under the heading of 'pregnancy counseling,'" *id.* at 31,244, and he put in the record an article showing that HHS program guidelines required counseling on the option of pregnancy termination for women who become pregnant while wearing an IUD or after having received DES. *Id.* at 31,245-46.

[35] That in the course of this extended debate Representative Dornan quoted from a letter written by Representative Rogers that suggests that the Congressman thought counseling and referral were already prohibited by section 1008 is irrelevant. *See* 124 Cong. Rec. 37,046. What is centrally relevant is what Congress did—it rejected the various amendments that would have overturned the Department's practice of providing Title X grants to programs that provide abortion counseling and referrals.

[36] That same year the House Committee on Energy and Commerce noted its disapproval of "proposed amendments that would affect the interpretation and implementation of [section 1008]. . . . The Committee does not intend—and would discourage—regulatory efforts to modify restrictions that the Committee has chosen to retain. *Previous efforts to create restrictions beyond the original intent of the law have been unnecessary and without statutory foundation.*" H.R. Rep. No. 159 at 6-7 (emphasis added).

Quarterly Weekly Report 2,589-90 (Dec. 7, 1985) (reporting on H.J. Res. 465). The House Committee on Appropriations rejected[37] that language as well.[38]

The following year, Congress instructed the Secretary not to change administrative policy regarding nondirective counseling. The Conference Committee Report accompanying that year's appropriations bill for Title X stated that the Secretary should "administer the program for FY 1987 in the same manner, and under the same allocation formula which governed program operations during FY 1986." H.R. Conf. Rep. No. 960, 99th Cong., 2d Sess. 12 (1986).[39]

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[37] Moreover, Congress consistently has appropriated funds for Title X without attempting to use the appropriations process to amend Title X to prohibit counseling and referral for abortion. Congress' decision not to do so cannot be attributed to mere omission, for the annual appropriations process has been the principal vehicle through which abortion restrictions, including the Hyde Amendment, have been implemented over the last fifteen years. *See, e.g.*, Senate Republican Policy Committee, *The Hyde Amendment: A Legislative History of Abortion Funding Restrictions on the Labor-HEW Appropriations Bill, reprinted in* 127 Cong. Rec. 10,677-83 (1981); 36 *Congressional Quarterly Almanac* 467-68 (1980) (describing history of anti-abortion riders to appropriations bills during the period from 1973 to 1980).

[38] Instead, the Committee included in the resolution language offered by Representative Richard Durbin prohibiting use of Title X funds for "advocating" abortions unless the woman's life was endangered. *Congressional Quarterly Weekly Report* at 2,590. The Appropriations Committee Report accompanying the resolution makes clear that the Committee did not equate advocacy of abortions with counseling and referral. H.R. Rep. No. 403, 99th Cong., 1st Sess. 6 (1985).

The Committee report's language was taken verbatim from the 1981 Guidelines for Title X programs, which required that nondirective counseling be provided upon request. *See supra* p. 14 & n.17. In a later compromise the committee language was dropped in return for an agreement barring Representative Kemp from offering his language as a floor amendment. *See Congressional Quarterly Weekly Report* at 2,590.

[39] Similar language restricting the Secretary's authority to promulgate new regulations was deleted by the Conference Committee

III. THE SECRETARY'S RESTRICTIONS ON THE PHYSICAL LOCATION OF TITLE X GRANTEES ARE CONTRARY TO STATUTORY INTENT AND ARE AN IRRATIONAL RESPONSE TO A NON-EXISTENT PROBLEM

Many Title X-funded programs are located in the same building or otherwise share physical facilities with reproductive or other general health care programs.[40] Section 59.9 of the Secretary's new regulations requires Title X-funded programs to maintain separate office space and treatment facilities and to use separate personnel, even if doing so requires substantial expenditures on duplicated facilities and decreases the ability of Title X grantees to coordinate their programs with those of other health care providers. These physical separation requirements are arbitrary and capricious.

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on the Fiscal Year 1988 Continuing Resolution in proposed form, because "[t]he administration insisted that this language would subject the conference report to a veto. Instead, the conferees included report language stressing the importance of making changes in this program through the authorizing process, rather than bypassing that process and utilizing regulations to propose changes that would otherwise be rejected." 133 Cong. Rec. H12,004-05 (daily ed. Dec. 21, 1987) (statement of Rep. Jamie Whitten, Chairman of the House Appropriations Committee).

Representative Whitten went on to explain that the conferees' action in deleting the restrictive language was not an endorsement of the proposed regulations. *Id.* at 12,005. Even so, the Conference Report noted that "[t]he Senate conferees and some House conferees believe that changes to existing law must be achieved through shared adherence to the constitutional process and express disagreement with the executive's bypassing that process through a regulatory device." H.R. Conf. Rep. No. 498, 100th Cong., 1st Sess. (1987), *reprinted in* 133 Cong. Rec. 12,709-10 (1987).

[40] In 1982 the Department of Health and Human Services estimated that 74 organizations receiving Title X funds also performed abortions at clinics collocated with the Title X clinic. Report by the Comptroller General 7, J.A. at 100.

A. The Requirement of Physical Separation Is Unsupported by Any Rational Consideration of the Connection Between the Facts Available to the Secretary and His Chosen Regulatory Means

The Secretary's physical separation requirement is not based upon any rational connection between the facts available to the Secretary and his chosen regulatory action. As the Court has explained, "[i]t is an axiom of administrative law that an agency's explanation of the basis for its decision must include a 'rational connection between the facts found and the choice made.'" *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 625 (1986) (plurality) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Ltd. v. United States*, 371 U.S. 156, 168 (1962))). If the agency has "offered an explanation for its decision that runs counter to the evidence before the agency," the Court will invalidate the agency's decision as arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. To determine whether there is a rational connection between the facts before the agency and the choice the agency has made, the court does not merely skim the facts available to the agency in search of any plausible connection between the facts and the agency's action. Rather, the court examines the information available to the agency, searching for a rational connection between that information and the agency's action.[41]

The requirement of physical separation rests on the Secretary's finding that:

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[41] "Agency deference has not come so far that we will uphold regulations whenever it is possible to 'conceive a basis' for administrative action. To the contrary, the 'presumption of regularity afforded an agency in fulfilling its statutory mandate' is not equivalent to 'the minimum rationality a statute must bear in order to withstand analysis under the due process clause.'" *American Hosp. Ass'n*, 476 U.S. at 626-27 (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 n.9 (1983)).

> [M]eeting the requirement of section 1008 *mandates* that Title X programs be organized so that they are physically and financially separate from other activities which are prohibited from inclusion in a Title X program. Having a program that is separate from such activities is a *necessary predicate* to any determination that abortion is not being included as a method of family planning in the Title X program.

53 Fed. Reg. 2,940 (emphasis added).

In announcing the new rules, the Secretary did not even attempt to support this finding.[42] Indeed, the experience of the Department in administering Title X belies the Secretary's claim of any need for the separation requirements. *See supra* at pp. 17-18 (discussing Comptroller General's Report); *see also* H.R. Rep. No. 159, 99th Cong., 1st Sess. 6 (1985) ("[I]n 1984, Secretary Heckler testified before the Subcommittee . . . that Title X grantees 'have been very aware and have honored the law in terms of the abortion prohibition . . .' This view was reiterated by the Acting Assistant Secretary . . . during the Subcommittee's 1985 Title X hearings.").[43]

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[42] While elsewhere in the preamble to the regulations the Secretary relies on reports issued by the General Accounting Office and the Department's Inspector General, 53 Fed. Reg. 2,923-24, these reports were not offered in support of the Secretary's finding that section 1008 "mandated" the physical separation requirements. This is because neither report supports this finding; both conclude that there have been few violations of the section 1008 proscription.

[43] To the extent that the Secretary relies upon the GAO's suggestion that he clarify the requirements of section 1008, 53 Fed. Reg. 2,923-25, that suggestion in no way justifies the drastic separation requirements the Secretary now imposes. The GAO's overall conclusion was that Title X-funded clinics were in substantial compliance with section 1008. *See* Report by the Comptroller General, J.A. at 82, 84, 86.

To the extent that the Secretary relies upon anecdotal evidence of noncompliance with earlier requirements that counseling be non-

Much of the experience of the federal government suggests that the Secretary is quite wrong in suggesting that physical separation is necessary to enforce the prohibition on the use of Title X funds for abortion. Grantees and contractors who do business with the federal government are subjected to a multitude of prohibitions, some concerning only the use of the funds supplied, *see, e.g.*, 2 U.S.C. § 441c (1988) (prohibitions on use of funds for political contributions), and some that are program or project-wide, *see, e.g.*, 41 C.F.R. § 60 *et seq.* (1989) (non-discrimination provisions). Yet it has never been seriously suggested that enforcement of these prohibitions requires the physical separation of the project receiving the federal funds from the remainder of an enterprise.

B. The Secretary's Failure To Consider the Oppressive Cost of the Physical Separation Requirement Renders the Requirement Arbitrary and Capricious

By failing to consider the prohibitive cost of complying with the physical separation requirements, and the effects of that cost, the Secretary has failed to consider an important aspect of the problem.[44] As originally proposed, section 59.9 required the Secretary to deny funding to any Title X grantee located in the same building as an abortion provider. Common office entrances and exits were prohibited, and the use of common street or mailing addresses "presumptively constitute[d] a failure to separate adequately Title X-funded programs from other programs which include abortion as a method of family planning . . . ." 52 Fed. Reg. 33,214 (1987). Merely leasing space in the same one-story building and

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directive, 53 Fed. Reg. 2924-25, none of the examples have anything to do with the location of abortion providers relative to Title X grantees.

[44] As the Court stated in *Motor Vehicle Manufacturers Association*, "normally, an agency rule would be arbitrary and capricious if the agency has . . . *entirely failed to consider an important aspect of the problem* . . . ." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (emphasis added).

sharing a common waiting area automatically resulted in a finding that the Title X program was "not 'separate and distinct, financially and physically,' from abortion-related activities." *Id.*[45]

The Secretary's proposals generated numerous comments concerning their oppressive cost. In promulgating the final rule, the Secretary conceded that "[m]any comments, particularly those from state and local governmental organizations, argued that the proposed restrictions would require a substantial investment in duplicate facilities, personnel and so on, which would render Title X funds uneconomic to accept." 53 Fed. Reg. 2,938-39.

The Secretary's response was to change the proposed *per se* rules into "indicia of separation," to be considered on a case-by-case basis. Apparently, the Secretary believed that this change relieved him of any responsibility to ascertain the likely impact of the rules. His response to the comments concerning cost was that, like Scarlett O'Hara, he would think about it tomorrow:

> Because of the adoption of a case-by-case determination . . . it is not possible to determine with any precision the costs that grantees will face in accommodating to the rules. However, the Department would note that most of the actual or apparent requirements of proposed § 59.9 that caused the most concern regarding costs, such as the stated requirement for separate entrances and exits and the apparent (although unintended) requirement to repave parking lots, no longer constitute *per se* tests under rules below. Certainly, the Department at this point does not have complete data about each of the 4,000 clinics presently in the program so that it could determine how much, if any, expense each would incur to maintain program integrity.

[45] The regulation left open the possibility of some shared resources "in exceptional cases where, as in the example of a large metropolitan hospital with abortion and family planning services located in different wings, the fact of physical separation is otherwise established and no use of appropriated funds in an ineligible program is likely." *Id.*

Id. at 2,940. The Secretary virtually conceded that he had no informed view as to the costs of complying with his physical separation rule or as to its resultant impact upon the availability of Title X services. His inability to reach an informed view of the cost of his own regulations evinces the lack of a sufficient factual basis for his decision. As the Court has explained,

> It is not infrequent that the available data do not settle a regulatory issue, and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion. Recognizing that policy making in a complex society must account for uncertainty, however, does not imply that it is sufficient for an agency to merely recite the terms 'substantial uncertainty' as a justification for its actions. . . . [T]he agency must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made.'

Moton Vehicle Mfrs. Ass'n, 463 U.S. at 52 (quoting *Burlington Truck Lines*, 371 U.S. at 168).

C. The Regulation Frustrates Statutory Intent To Facilitate Provision of Health Care Services to Title X Patients

1. *Title X Is Intended To Integrate, to the Maximum Extent Feasible, Family Planning and Other Health Care Programs*

From the outset, the Department sought to integrate Title X programs with other health care facilities in order to facilitate the statutory goal of "making comprehensive voluntary family planning services readily available to all persons desiring such services." Pub. L. No. 91-572, § 2(1), 84 Stat. 1504 (1970). The Secretary's first five-year plan set forth as its goal the establishment of family planning programs in a wide variety of preexisting health care facilities, including private physicians' offices, voluntary agencies, local health departments, obstetrics clinics, and hospitals. Included in

that goal was the integration of family planning and pregnancy or abortion services:

> Effective interrelationships with the total health care system for the benefit of the patient also requires that the project provide orientation in family planning to the personnel of other health and social service programs which are, or may become *sources of referral*, such as hospital emergency rooms, outpatient clinics, drug rehabilitation programs, VD clinics, *abortion clinics*, and welfare programs.[46]

Accordingly, since 1971 the agency has made Title X grants to programs collocated with abortion providers.[47]

Subsequent pronouncements by Congress confirm the statutory intent of facilitating wide access to family planning services through "close coordination and, whenever possible, integration of family planning services into all general health care programs. . . . [T]he conferees believe that family planning services under title X generally are most effectively provided in a general health setting and thus encourage coordination and integration into programs offering general health care."[48] Although

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[46] *Report of the Secretary of Health, Education and Welfare Submitting Five-Year Plan for Family Planning Services and Population Research Programs for the Special Subcomm. on Human Resources of the Senate Comm. on Labor and Public Welfare*, 92 Cong., 1st Sess. 318 (1971) (emphasis added).

[47] *See* Memorandum from Joel A. Mangel, Deputy Ass't General Counsel, to Louis M. Hellman, M.D., Deputy Ass't Secretary for Population Affairs (Apr. 20, 1971), J.A. at 35.

[48] H.R. Conf. Rep. No. 1524, 93d Cong., 2d Sess. 58 (1974). *See also* S. Rep. No. 29, 94th Cong., 1st Sess. 66 (1975) ("[F]amily planning services under title X generally are most effectively provided in a general health setting and thus [the Committee] encourages coordination and integration into all programs offering general health care."). In the one reported case analyzing legislative intent on the issue of collocating Title X programs with other health care programs, including those that provide abortions, a federal district court struck down a state requirement that Title X programs be physically separate from abortion providers as violative of Title X's statutory intent. *See Planned Parenthood v. Montana*, 648 F. Supp. 47, 51 (D. Mont. 1986).

Congress has been repeatedly advised that because of this integration some Title X programs are located "down the hallway" from abortion providers,[49] it has made no attempt to change that practice.

2. *The Secretary's Drastic Physical Separation Requirements Frustrate the Statutory Goal of Integration of Family Planning Services*

As noted, the Secretary's original proposal generated a blizzard of negative comments. As to continuity of care, the Secretary noted that "[n]umerous comments, particularly from public providers, argued that the trend in public health has been to locate related services together, to facilitate full utilization by clients of needed services." 53 Fed. Reg. 2,939.

For all intents and purposes, the Secretary did not respond to the comments concerning continuity of care. In adopting the final rule, he stated, in relevant part:

> The example typically cited—the Title X clinic that is located at the same site as a project funded under another program that provides genetic screening and counseling—*may not be affected by the requirements revised, if the project can show that the later project's activities meet the separation indicia of § 59.9 below.* To the extent the rules below minimize continuity between family planning and abortion, this is a result which the Department views as consistent with section 1008.

Id. at 2,941 (emphasis added).

This "response" leaves grantees totally at sea as to what is required. It is also utterly at odds with the purpose of Title X. First, the Secretary in effect conceded that he did not know the extent to which his enforcement of the physical separation requirements will impede continuity of care. Second, the Secretary conceded that, to the extent that the rules do in fact impede continuity of care, he chose to subordinate the statutory objective to *his* separation requirements. Third, in consciously dis-

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[49] 124 Cong. Rec. 37,046 (1978) (statement of Rep. Rogers).

rupting the continuity of care between abortion providers and family planning services, he willfully and unnecessarily burdened the ability of persons, *in the aftermath of abortion*, to obtain family planning services. This "response" cannot be reckoned with Congress' clear intent to provide continuity of care to Title X patients and to expand the availability of family planning services.

CONCLUSION

For the foregoing reasons, *amici curiae* urge that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

DAVID M. BECKER *
JOAN M. GERHART
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000
Counsel for Amici Curiae

Dated: July 27, 1990

* Counsel of Record

Nos. 89-1391, 89-1392

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DR. IRVING RUST, on behalf of himself, his patients and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

Petitioners,

v.

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

THE STATE OF NEW YORK, THE CITY OF NEW YORK, THE NEW YORK CITY HEALTH & HOSPITALS CORP.,

Petitioners,

v.

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

On Writs of Certiorari To The United States Court of Appeals for the Second Circuit

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BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND OTHER ORGANIZATIONS† AS AMICI CURIAE IN SUPPORT OF PETITIONERS

JULIUS LEVONNE CHAMBERS
CHARLES STEPHEN RALSTON*
SHERRILYN A. IFILL
MARIANNE ENGELMAN LADO
CHARLOTTE RUTHERFORD
99 Hudson Street, 16th Fl.
New York, NY 10013
(212) 219-1900

* *Counsel of Record* *Counsel for Amici Curiae*

† Individual *amici* are listed beginning on the inside front cover.

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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THE NATIONAL BLACK WOMEN'S HEALTH PROJECT, NATIONAL URBAN LEAGUE, INC., MEXICAN AMERICAN LEGAL DEFENSE & EDUCATIONAL FUND, MEXICAN AMERICAN WOMEN'S NATIONAL ASSOCIATION, NATIVE AMERICAN COMMUNITY BOARD, THE WOMEN OF COLOR PARTNERSHIP PROGRAM OF THE RELIGIOUS COALITION FOR ABORTION RIGHTS, THE BLACK, ASIAN PACIFIC, HISPANIC AND NATIVE AMERICAN CAUCUSES OF THE NATIONAL WOMEN'S POLITICAL CAUCUS, AMERICAN INDIAN HEALTH CARE ASSOCIATION, OFFICE OF CHURCH & SOCIETY OF THE UNITED CHURCH OF CHRIST, NEW YORK CITY COMMISSION ON HUMAN RIGHTS, NATIONAL INSTITUTE FOR WOMEN OF COLOR, NATIONAL MEDICAL ASSOCIATION.

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QUESTION PRESENTED

(1) Whether agency restrictions on Title X family planning services that will imperil the health of poor African American women and other low-income women of color contravene Congress' intent and are, therefore, invalid?

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SUMMARY OF ARGUMENT

Amici, supporting petitioners, contend that the regulations promulgated by the Department of Health and Human Services (HHS) that prohibit pregnancy counseling and referral in Title X family planning clinics contravene Congress' intent in enacting Title X and are, therefore, invalid.

Title X of the Public Health Service Act was enacted to address a national shortage of reproductive health care services[1] for poor women. Congress

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[1] Comprehensive reproductive health care has been interpreted to be inclusive of, but not limited to: physical examinations and pap smears, contraceptive counseling and distribution, screening and/or treatment for sexually transmitted diseases and other gynecological illnesses, genetic screening, pregnancy testing and options counseling and referrals, and prenatal care. See HHS, Program Guidelines for Project Grants for Family Planning Services, (1981) at 7-16; JA at 32A-41A. (Hereinafter cited as HHS,

specifically targeted African American women and women of color as intended beneficiaries. In drafting the program, Congress placed particular significance on providing poor minority patients with non-coercive family planning information and comprehensive reproductive health services.

The challenged regulations directly conflict with this Congressional mandate. The new restrictions on counseling and referrals and the requirement that programs be physically and financially separated will reduce services for millions of low-income women, with a disproportionate share of the burden borne by women of color. The regulations will operate to limit health care in a number of ways: first, the availability of

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Program Guidelines).

health services and information to low-income women will be restricted because clinics will be forced to close; second, the quality of care received by clinic patients who are diagnosed as pregnant will be compromised; and third, poor women will be prohibited from exercising the full range of pregnancy options that are available to affluent women.

ARGUMENT

I. THE CHALLENGED REGULATIONS CONTRAVENE CONGRESS' INTENT IN ENACTING TITLE X IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT.

The Administrative Procedure Act authorizes a reviewing court to invalidate agency regulations that conflict with the law or that are beyond the scope of

statutory jurisdiction.[2] The challenged Title X regulations,[3] which contravene Congress' intent in enacting Title X, fall outside of the delegated power and statutory authority of the Department of Health and Human Services (HHS), and are, therefore, invalid.

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[2] The Administrative Procedure Act states, in relevant part:

> The reviewing court shall -- ...
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be --
>
> (A) arbitrary, capricious, an abuse of discretion, or <u>otherwise not in accordance with law</u>; ....
>
> (C) <u>in excess of statutory jurisdiction, authority, or limitations, or short of statutory right</u> ....

5 U.S.C. 706. (emphasis added)

[3] Codified at 42 C.F.R. §§ 59.7-59.10 (Feb. 2, 1988).

A. Congress Intended Title X to Provide Comprehensive Reproductive Health Care for Low-Income Women and Women of Color.[4]

Title X of the Public Health Service Act was enacted in 1970 with broad bipartisan support to address a national crisis in the provision of comprehensive reproductive health care for poor women. Thus, the purpose of the Act was to ensure the availability of health information, referrals, counseling, and medical care to women who, by reason of their economic status, do not enjoy the benefits of comprehensive health care. At the time of the passage of the Act, over 5 million medically indigent women in the United States were without vital health care

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[4] The term "women of color" refers to women of African American, Hispanic or Latina, Asian/Pacific Island and Native American ancestry.

services. See 116 Cong. Rec. S. 24,089, 24,092-96 (daily ed. July 14, 1970) (Statement of Sen. Eagleton, Hart); JA at 206A-210A; 116 Cong. Rec. H. 37,365, 37,382 (daily ed. Nov. 16, 1970) (Statement of Rep. Harrington); JA at 234. Indeed, 7 out of 10 women in New York who needed family planning services were denied such services because of poverty. See 116 Cong. Rec. H. 37,365, 37,385-86 (daily ed. Nov. 16, 1970) (Statement of Rep. Harrington); JA at 237A-238A. The severity of this health crisis, and its social, economic and environmental implications, inspired Congress to overcome controversy over the question of abortion, and to create a program which would respond to the "need for non-coercive family planning services" for poor women. See 116 Cong. Rec. S. 24,089,

24,092 (daily ed. July 14, 1970) (Statement of Sen. Eagleton); JA at 207A.

In targeting the poor with this legislation, Congress recognized that Title X also necessarily and specifically targeted minority women. See 116 Cong. Rec. H. 37,365, 37,374 (daily ed. Nov. 16, 1970) (Statement of Rep. Schmitz); JA at 226A. ("The people at whom this bill is specifically aimed are the poor. . . and . . . minorities.") Noting, for example, the higher rate of poverty among non-whites, one member of Congress testified that in 1970 "the infant mortality rate among non-whites [was] three times that of whites, with a maternal mortality rate four times greater." See 116 Cong. Rec. H. 37,365, 37,380 (daily ed. Nov. 16, 1970) (Statement of Rep. Kyros); JA at 232A.

Shirley Chisholm, then a United States Representative from New York, testified at length before the Senate Subcommittee on Health about the disproportionate burden poor African American and Hispanic women bore as a result of their lack of access to adequate family planning health care. Congresswoman Chisholm noted, for example, that septic and self-induced abortions accounted for the maternity-related deaths of "only 25 percent of white women while it caused 49 percent of the [maternity-related] deaths of non-white women and 56 percent of the [maternity-related] deaths of Puerto Rican women in New York City in 1969." Hearings on S. 2108, S. 3219 Before the Subcomm. on Health, Committee on Labor and Public Welfare, 91st Cong., 1st. Sess. 195 (Dec. 9, 1969) (Statement of Rep. Shirley A. Chisholm). Sue

Randall, then migrant project coordinator for Southwest Region Planned Parenthood of Austin, Texas, attested to the desperate need for federal family planning programs to serve the predominantly Mexican-American migrant population in the Southwest. Id. at 218-219.

Congress was well aware of the critical need for adequate family planning services for poor women of color. Congressional hearings held prior to the passage of Title X amassed a wealth of evidence, including the testimony and written statements of over 30 expert and professional witnesses and over 40 medical, legal and religious oranizations. The weight of this evidence indicated that poor women in general, and women of color in particular, were in need of comprehensive reproductive health

services. See, e.g., Testimony of Cong. Ottinger See 116 Cong. Rec. 37,365, 37,386 (Statement of Rep. Ottinger); JA at 238A. Despite the continued controversy over the question of abortion,[5] therefore, Congress envisioned and drafted Title X as a unique program that would succeed where previous, less ambitious, programs had failed. Title X's broad reach contemplated the use of funds for the training of personnel, research, public education and medical care. 42 U.S.C. §§ 300 a-1, a-2 and a-3.

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[5] Congress addressed the concern expressed by some witnesses and Congresspersons that the program not fund abortion by including Section 1008 of the Act, which prohibits the use of Title X program funds "in programs where abortion is a method of family planning." 42 U.S.C. §300a-6. Prior to 1987, HHS had never interpreted this language to prohibit referrals to abortion providers.

In constructing the program, Congress placed particular significance on the provision of health information to poor women. See 116 Cong. Rec. H. 37,365, 37,387 (daily ed. Nov. 16, 1970) (Statement of Cong. Broomfield); JA at 239A. It was frequently emphasized that the information provided to Title X patients would be "non-coercive". See 116 Cong. Rec. S. 24,089, 24,092 (daily ed. July 14, 1970) (Statement of Sen. Eagleton); JA at 206A. See 116 Cong. Rec. H. 37,365, 37,389 (daily ed. Nov. 16, 1970) (Statement of Rep. O'Hara); JA at 241A; Id. at p. 37,388 (Statement of Rep. Burke); JA at 240A; Id. at p. 37,384 (Statement of Rep. Bingham); JA at 236a; Id. at p. 37,370 (Statement of Cong. Bush) JA at 222A. Congress recognized the danger of coercive family planning

services aimed at the poor, whose unique, dependent status places them in a vulnerable position, especially in the context of the insular physician-patient relationship. See 116 Cong. Rec. H. 37,365, 37,389 (daily ed. Nov. 16, 1970) (Statement of Rep. Burke); JA at 241A. Congress was careful, therefore, to ensure that the services provided would be non-coercive and respectful of "the consciences of peoples of all faiths," yet broad enough to meet the critical family planning needs of poor women. See 116 Cong. Rec. H. 37,365, 37,370 (daily ed. Nov. 16, 1970) (Statement of Rep. Bush); JA at 222A.

Although at the time of the passage of the Act abortion was legal in only four

states,[6] Congress contemplated that the information and referrals provided under Title X would include the full range of available medical options for addressing a patient's medical condition. See, e.g., 116 Cong. Rec. S. 24,089, 24,095-96 (daily ed. July 14, 1970) (Statement of Sen. Hart); JA at 209A-210A. Indeed, the legislative history reveals that Congress was particularly concerned that non-coercive information and medical counseling be provided to poor women who faced unwanted pregnancy. See, e.g., Statement of Sen. Eagleton, supra, at 24,092; JA at 206A. Congress specifically intended, therefore, that "[t]he information and educational materials

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[6] In 1970, abortion was legal in Alaska, Hawaii, New York and Washington. See, e.g., 116 Cong. Rec. H. 37,365, 37,379 Nov. 16, 1970) (Statement of Rep. Dingell); JA at 231A.

[provided as part of the program] should not be aimed at motivation, especially at motivating the person to adopt a particular ideology. . . ." Statement of Rep. Burke, supra at 37,388; JA at 240A.

B. The New Regulations Reverse Long-Standing Agency Policy And Are Inconsistent With Congress' Intent To Provide Non-Coercive, Comprehensive Health Care.

The weight to be accorded to an agency's statutory interpretation depends, in part, upon its consistency with earlier and later pronouncements. General Electric Co. v. Gilbert, 429 U.S. 125, 141-42 (1976); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). See Saint Mary of Nazareth Hosp. Center v. Schweiker, 718 F.2d 459, 469 (D.C.Cir. 1983); United Transportation Union v. Lewis, 711 F.2d 233, 242 (D.C.Cir. 1983). HHS' decision, in 1987, to prohibit Title X-funded

doctors from discussing the abortion option with their patients and from providing referrals for such services, constituted an abrupt reversal of agency interpretation. This reversal directly conflicts with Congress' intention that poor women be provided with comprehensive reproductive health care. As such, these new regulations fall outside HHS' delegated authority and are owed no deference.

For the first seventeen years of the program's operation, the administering agency, first the Department of Health, Education and Welfare (HEW), and now HHS, interpreted Congress' mandate that non-coercive information and services be provided to Title X patients to include information about abortion services, where indicated. HHS, Program Guidelines,

supra. Suddenly, without any direction or concern being raised by Congress, the agency has rewritten its regulations to exclude counseling and referral about the abortion option.

The political controversy which has spawned the new HHS regulations was not unforeseen by Congress. From the outset, Congress recognized that strong and clear direction from Congress to the administering agency would be necessary to the success of Title X as a non-coercive, comprehensive "health-care service mechanism." Statement of Rep. Bush, supra, at 37370; JA at 222A; Statement of Rep. Hawkins, supra at 37370; JA at 222A; Several Congressmen acknowledged that family planning "health services to the poor ha[d] been grossly mismanaged in the past" by the agency. Statement of Rep.

Bush, supra, at 37,371; JA at 223A. One sponsor of the Act, Congressman Scheuer, expressed open distrust of the agency's capacity to administer the program in accordance with the letter and spirit of Title X that was intended by Congress. Despite the testimony from then HEW Secretary Elliot Richardson in support of the legislation, Congressman Scheurer pointed out that it was Congress, not HEW, which "consistently led the way in lifting the curtain of controversy from family planning," and "forced the Department to face its responsibilities." Statement of Rep. Scheuer, supra, at 370; JA at 222A. Congressman Scheurer predicted that Congress would need "to continuously exercise the maximum degree of legislative review and moral leadership" to ensure that the success of the program was not

undermined by political pressure and agency mismanagement. Id.

Despite 17 years of consistent and conscientious interpretation of the Act by HHS in accordance with Congressional intent, HHS has now proved the accuracy of Congressman Scheuers' prediction. HHS' actions infuse political and religious beliefs into Title X by requiring that providers deny their patients information about the full range of medical options for dealing with pregnancy. The disastrous results these regulations will have on the integrity of Title X-funded programs, and on the health of the poor women who use them, demonstrates the new regulations' flagrant conflict with Congress' intent.

C. The Challenged Regulations Will Result In a Dual System of Health Care Which Will Imperil the Health of Poor Women, A Disproportionate Number of Whom Are African American And Other Women of Color.

The new regulations will directly limit access to basic health care for the millions of poor women who rely on federally funded family planning services, thereby contravening the program's congressional mandate.

Congress indicated that Title X was specifically aimed at eradicating a dual system of health care for poor and wealthy women. See PPFA v. Bowen, 680 F. Supp. 1465, 1469 (D. Colo. 1988) (Title X designed to eliminate a two-tiered system of delivery of family planning services). In the committee report accompanying the final House version of the Title X bill, Congress acknowledged that the lack of

free family planning services "deprives low-income women of the right to effectively plan their families, a right long enjoyed by more affluent couples. This form of discrimination, based on economic status, has many unfortunate health, social and financial consequences for the individual, family and the society." H.R. Rep. No. 1472, 91st Cong., 2d Sess, reprinted in 1970 U.S. Code Cong. and Admin. News at 5074; JA at 252A. HHS' promulgation of regulations that deliberately foster ignorance about medical options and compel physicians to provide substandard health care to poor women is "an attempt to coerce or 'punish' the poor," in direct conflict with Congress' intended purpose in enacting the statute. 116 Cong. Rec. 37,263, 37,389 (1970); JA at 241A. 116 Cong. Rec. H.

37,365, 37,389 (daily ed. July 14, 1970) (Statement of Rep. Burke); JA at 241A.

Low-income women and teenagers at risk of pregnancy, a disproportionate number of whom are African American and other women of color, often have greater problems than higher income and older women in obtaining medical care. Poor and young women simply cannot afford medical services and often have less experience or knowledge about how to navigate the fragmented American health care system. Clinics that rely on Title X funds, in whole or in part, often provide the only continuous health care that poor women, particularly the uninsured, may receive.[7]

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[7] HHS itself has acknowledged that "[f]or many clients, family planning programs are their only continuing source of health information and medical care." HHS Program Guidelines, supra, at sec. 9.4 (39A). See also HEW, A Report on Family Planning Services and Population Research

Additionally, Title X clinics are currently relied upon by their patients to provide a wide range of health information and referrals that are otherwise unobtainable in low-income communities. Other types of health care, such as infant care, teen counseling, high risk pregnancy care, and abortion services, are often provided by programs located in the same facility as the Title X family planning service. See, e.g., Morgan Aff. at ¶ 1.

Because African American and other women of color are overrepresented as clinic patients, they will be severely disadvantaged by any limitations imposed on family planning clinics.

The challenged regulations will limit the health care that Title X provides in several ways: the availability of health

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18 (Dec. 1978) (309A).

services and information to low-income women will be restricted because a number of clinics will be forced to close; the quality of care received by clinic patients who are diagnosed as pregnant will be compromised by the prohibition on counseling about their options; and the lives and well-being of those women for whom abortion may be medically indicated will be jeopardized by the lack of information.

Significantly, the regulations will disadvantage and limit health care services only for the poor. Affluent women, capable of paying private doctors for medical care will continue to have access to information about the full range of pregnancy options, including abortion, while poor pregnant women and adolescents will be denied access to such basic

information and will be uninformed about the abortion option.

Moreover, affluent women will be able to make decisions regarding their pregnancies in consultation with their physicians based on reasoned, impartial and complete information about medical options, as currently required by federal and state law, as well as medical ethical guidelines. See Morley Aff. at ¶¶ 18-22; JA at 664A-666A. Rosenfield Aff. at ¶¶ 7, 23; JA at 679A, 689A. Women able to pay for private physicians will be able to make their health decisions free from government mandated coercion by physicians.

Poor pregnant women, on the other hand, will always be steered toward childbirth by Title X providers. These health professionals will be compelled by the new

regulations to provide all pregnant women with only prenatal care information and referrals, irrespective of the patient's physical or emotional condition, and without regard for the attending physician's best medical judgment.

Congress did not intend such a result when Title X was enacted.

1. The challenged regulations will result in fewer health care resources and substandard medical care for low-income African American and other women of color, thereby endangering their health.

Under 42 CFR § 59.9 of the new regulations, federally funded clinics will be required to separate their Title X programs physically as well as financially from any non-federally funded program that provides abortion counseling, referrals or services. Title X-funded clinics may be, at the Secretary's discretion, prohibited

from sharing office space, buildings, telephones, staff or medical records with programs providing abortion services or engaged in abortion-related activities. Not only will the regulations serve to fragment the comprehensive health care scheme envisioned by Congress, but for most clinics, the expense of establishing a separate facility with separate staff will be prohibitive.

The regulations will force many organizations that receive Title X funds into one of the following options: eliminate either the family planning program or the program that offers abortion counseling; lose federal funding altogether, jeopardizing financial stability and continued operation; or cease to operate entirely. See Morley Aff. at ¶¶ 7-8; JA at 660A-661A. Each of

these options will result in a devastating loss of health care to low-income communities that can ill-afford any reduction in services.

In affidavits filed in proceedings in the Second Circuit and other jurisdictions, health practitioners and program directors have stated that it is not economically feasible to operate separate facilities for family planning services and for abortion services.[8]

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[8] Moran Affidavit, at ¶8; (The loss of these funds, constituting 50% of our family planning budget at the Bronx Center would compel a drastic reduction in services to low-income women in the South Bronx.") Affidavit of Margie F. Hale, Exec. Dir., The Women's Health Center of West Virginia, Inc., West Virginia Association of Community Health Centers v. Sullivan, C.A. 2:89-0330 (S.D.W.V.) ("[I]f Title X regulations ban the co-location of family planning services and abortion services, the Center would terminate its family planning services.") See Appendix at 35a at ¶8; Affidavit of Bruce Berry, M.D., Vice Chairman of the West Virginia

Section of District 4 American College of Obstetricians and Gynecologists, West Virginia Association of Community Health Centers v. Sullivan, C.A. 2:89-0330 (S.D.W.V.) ("[T]he ramifications of the implementation of the regulations are especially devastating to the obstetrics and gynecological community in West Virginia in that in the last five years the number of obstetricians and gynecologists in West Virginia has been greatly reduced from 130 to 80. The regulations would place a heavy burden on the remaining obstetricians and gynecologist in West Virginia because it would force many Centers to close and encourage competent physicians to leave the State.") See Appendix at 21a ¶8; Affidavit of Leslie Tarr Laurie, Exec. Dir. of Family Planning Council of Western Massachusetts ("FPCWM"), Commonwealth of Massachusetts v. Bowen, 679 F. Supp. 137 (D. Mass. 1988), aff'd, 899 F.2d 53 (1st Cir. 1990) ("[I]f Title X regulations banned the co-location of family planning with abortion services, FPCWM would be forced to terminate family planning services in two geographical areas because it would not be economically feasible to open separate facilities.") See Appendix at 45a, ¶8; Affidavit of Diane M. Booth, Exec. Dir., Planned Parenthood of Central Missouri ("PPCM"), Commonwealth of Massachusetts v. Bowen, 679 F. Supp. 137, aff'd, 899 F.2d 53 (1st Cir. 1990) ("In the event that total separation of services is required at the Columbia clinic [the only facility providing first

Furthermore, many providers have stated that they would cease practicing for ethical reasons, if prohibited from giving complete and comprehensive medical information to pregnant patients. Drisgula Aff. at ¶ 30; Felton Aff. at ¶ 13(c); O'Hora Aff. at ¶ 14.

a. African American and other women of color are overrepresented among Title X patients and will be disproportionately affected by any decline in services.

This Court has long played an important role in the protection against administrative intrusion on the interests of the disadvantaged. See Yick Wo v. Hopkins, 118 U.S. 356 (1886); United States v. Carolene Products Co., 304 U.S.

trimester abortion services between Kansas City and St. Louis], it is likely that PPCM would opt not to receive Title X funding, thereby reducing the opportunity for low-income people to receive family planning services.") See Appendix at 26A, ¶13.

144, 152, n.4 (1938). Indeed, administrative regulations which impinge upon areas of judicial concern -- whether or not the restriction or violation has risen to a constitutional level -- are entitled to a lesser degree of judicial deference and are subject to greater examination. See e.g., Green v. McElroy, 360 U.S. 474, 508 (1959); United States v. Weller, 401 U.S. 254, 257 (1971). Where, as in this case, an administrative agency's action will disproportionately and significantly affect the interests of poor African American and other women of color, and that action was not authorized by Congress, the agency's action should be found invalid.

Title X health services are a primary source of health care for African American and other poor women of color. See Tiezzi

Aff. at ¶ 8(a) JA at 726A-727A African American women make up only 12.9% of all women of reproductive age (15-44 years),[9] but in 1983, they represented 26% of all family planning clinic patients. The Alan Guttmacher Institute, Organized Family Planning Services in the United States, 1981-1983, at 29 (1984) (hereinafter cited as Guttmacher, Organized.) In 1988, an estimated 3.74 million women used a Title X clinic in their last family planning visit during the previous 12 months; of these, 28.1% were African American and 3.2% were other women of color. Mosher, W., Use of Family Planning Services in the

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[9] Latina women are 7.5% of women of reproductive age, other women of color 3.1%, and white women 76.5%. Forrest, J., Gold, R., and Kenney, A., The Need, Availability and Financing of Reproductive Health Services 3, The Alan Guttmacher Institute (1989) (hereinafter cited as Forrest, The Need.)

United States: 1982 and 1988, at 4, from Vital Health Statistics of the National Center for Health Statistics, No. 184 (April 1990) (hereinafter cited as Mosher, Use.) In 1988, 53% of African American women and only 32% of white women used a clinic for their most recent family planning visit. Id. at 2-3.

African American women are most likely to rely on clinics for family planning services because they are less likely than white women to have health insurance coverage, sufficient income to pay the fees of private doctors, or a regular source of medical care. Id. at 3 and n.4. Overall, 22% of African American and 33% of Hispanic, Asian/Pacific Island and Native American female heads of families are uninsured, compared to 15% of white female heads of families. Children's

Defense Fund, Black and White Children in America: Key Facts 27-29 (1985) (hereinafter cited as CDF, Key Facts.) Further, in 1986, 26.4% of African American children under age 18 were uninsured, compared to 17.5% of white children of the same age who were uninsured.

Indeed, while low-income women in general were much more likely than higher income women to rely on clinics for their family planning services, African American women of all incomes relied heavily on these services. For example, in 1988, 60% of all low-income women used clinics for their most recent visit, compared with only 27% of all women with incomes of 150% of poverty or more, while among African American women, 67% of low-income and 41% of higher income African American women

used family planning clinics. Mosher, Use, supra, at 3-4.

b. The new regulations will reduce services for low-income women and teens who lack health coverage and rely on family planning clinics.

Access to health care is determined by one's economic and employment status. Nonelderly individuals and families who rely on public benefit programs, such as Aid to Families with Dependent Children (AFDC) for their sole source of income are eligible for medical coverage through the federally funded Medicaid program.[10] Among women aged 15-44, with family incomes below the federal poverty standard, four in ten depend on Medicaid for access to medical care. Fewer than one in ten women with slightly higher incomes (100-199% of

[10] See, 42 U.S.C. §§ 1396 et seq. 1982 ed.

poverty) and only two percent of higher income women are covered by Medicaid or other public programs. Forrest, The Need, supra, at 18. Regrettably, more than one-third of women between 15-44 years of age and below 100% of poverty have no health insurance coverage. Id. Among teenaged women aged 15-19, 20% are not covered by insurance. Id. Congress intended the Title X program to serve the many low-income women who cannot afford alternative sources of health care.[11]

Nationwide, in 1983, an estimated 83% of family planning program patients had low incomes (below 150% of poverty), including 13% who received public assistance. Guttmacher, Organized, supra,

[11] Under the Act, low-income patients are to receive free services, 42 U.S.C. § 300a-4(c), and charges for others are determined by family income on a sliding fee basis.

at 25. AFDC recipients often use Title X-funded family planning clinics, as well as private doctors who accept Medicaid patients for contraceptive and general medical services and referrals.[12]

An estimated 1.6 million women under

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[12] Studies have shown that even when Medicaid is made available to those who need assistance, many physicians and providers are unwilling to accept Medicaid eligible patients, due to lower than private pay reimbursement rates, bureaucratic red tape, and other factors. G. Dallek, Health Care for America's Poor: Separate and Unequal, 20 Clearinghouse Rev. 361, 366 (1986)(citing studies).

HHS recognizes the disproportionate dependence of people of color on federally funded health care services. HHS has noted that certain health care providers' policies that limit access to care based on patients' status as Medicaid recipients may have a disproportionate racial impact in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d. See Internal Memorandum, U.S. Dept. of Health, Education, and Welfare, Office of Civil Rights, from David F. Chaukin to Carolyn Russell (Dec. 11, 1980). Such impact is certainly present in this case, because of the heavy reliance of women of color on Title X-funded programs.

age 20 obtained family planning services from organized clinics in 1983, constituting more than 30% of all clinic patients. Guttmacher, Organized, supra, at 28. African American teenagers, in particular, rely heavily on clinic services. In 1988, 40.9% of all African American teenagers aged 15-19 had visited a family planning clinic within the last 12 months. Mosher, Use, supra, at 2.

African American teens are twice as likely as white teens to become pregnant.[13] Seventy-three percent of all pregnancies to African American teens between the ages of 15 and 19 were unintended in 1980, compared with 63% of unintended

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[13] CDF, Key Facts, supra, at 39. Teenage births accounted for approximately one-quarter of all births to African American mothers and 12% of all births to white mothers. Id. at 38.

pregnancies among white teens.[14] Of 10,200 births to mothers under age 15 in 1986, 58% of the mothers were African American, 39% white and 13% Hispanic. Children's Defense Fund, A Vision for America's Future: An Agenda for the 1990's: A Children's Defense Fund Budget 93 (1989) (hereinafter cited as CDF, A Vision.) An essential prevention strategy for those teens who are sexually active is access to contraceptive services and counseling. If the challenged regulations are approved, African American teens will suffer disproportionately from reduced access to clinics and contraceptive information and services.

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[14] Thirty-nine of 100 African American teens with unintended pregnancy actually have a baby, compared with 25 out of 100 white teens. CDF, Key Facts, supra, at 39.

2. The requirement that services be segregated will impede the provision of care to intended beneficiaries.

The requirement that various family planning services be segregated will result in delayed or no follow-up services for many patients. Moreover, for poor women the segregation of services will mean incurring the often prohibitive expense of traveling to additional locations for needed health care. Most importantly, as stated above, many clinics will be forced to close because of the additional costs associated with physically separating related services. See Moran Aff. at ¶ 8.

The closure of clinics and even the elimination of existing programs will reduce access to abortion services, prenatal care and other vital medical services for clinic patients. In sum, the

physical segregation of family planning from abortion-related services will serve to disadvantage the very population that Title X is designed to serve and will compromise the health care provided by the clinics. Congress did not intend such a result.

3. The counseling and referral prohibitions of the new regulations will undermine the provision of reproductive health care to all pregnant patients and may endanger the lives of African American and other women of color with serious health conditions.

The new Title X regulations will have an adverse effect on the health of poor pregnant patients, whether or not they wish to terminate their pregnancies. Clearly, under the new regulations, women of color will be steered away from abortion. Without a referral from the Title X clinic, some women will be unable

to locate and obtain abortion services until later, more dangerous stages of pregnancy. Indeed, the mortality risk for abortion increases 50 percent with each week after the eighth week of pregnancy, and the risk of major complications in the procedure increases by approximately 30 percent per week. See Morley Aff. at ¶12; JA at 662A. See also Grimes, Second-Trimester Abortions in the United States, 16 Fam. Plan. Persp. 260-265 (Nov./Dec. 1984). The dangers are particularly acute for adolescents, who most often postpone pregnancy confirmation and abortion until the second trimester of pregnancy. See Henshaw Aff. at ¶14; Morley Aff. at ¶ 12.

Without adequate information, other clinic patients will self-induce abortion or seek illegal back street abortions at great risk to their life and health. In

1970, prior to the enactment of Title X, it was reported that "botched abortions [were] the single largest cause of maternal deaths in the U.S." Statement of Rep. Chisholm, supra, at 195.

Even pregnant patients who wish to carry pregnancy to term will be injured by the new regulations. Early prenatal care is the key to ensure a healthy and safe pregnancy for both the mother and child.[15] A lack of prenatal care can result in low-birth weight babies,[16] infant mortality,[17]

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[15] Gold, R., Kenney, A., and Singh, S., "Paying for Maternity Care in the United States" 19 Family Planning Perspectives 190 (No. 5, Sept./Oct. 1987).

[16] Low birth weight is defined as less than 5.8 pounds and is a leading cause of infant death. Small babies who survive face an increased risk of being impaired for life by autism, retardation, cerebral palsy, epilepsy, learning disabilities and vision or hearing loss. CDF, A Vision, supra, at 38.

In 1982, 6.2% of all Native American

and maternal mortality.[18] Yet the challenged regulations interfere with the kind of integrated services that

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babies born were of low birth weight, compared to 6.9% of all Filipino babies, 9.1% of all Puerto Rican babies, 12.4% of all African American babies and 5.6% of all white babies. HHS, Office of Minority Health, Closing the Gap, "Infant Mortality, Low Birth Weight and Minorities" 1 (1988).

[17] In 1987, the infant mortality rate per 1,000 live births was 5.4% for Asians, 7.9% for Hispanics, 8.6% for whites, 9.9% for Native Americans and 17.9% for African Americans. National Commission to Prevent Infant Mortality, Troubling Trends: The Health of America's Next Generation 20 (1990).

[18] In 1986, African American women were 3.8 times more likely to die from pregnancy causes than white women. Non-white women were 3.3 times more likely to die from pregnancy related causes than white women. The leading causes for these maternal deaths are considered "preventable or probably preventable through routine medical care before pregnancy, early and continuous prenatal care, risk appropriate delivery procedures, and routine care after birth." Children's Defense Fund, The Health of America's Children: Maternal and Child Health Data Book 10 (1989).

facilitate enrollment in family planning and counseling programs.

The new regulations expressly state that once a patient is diagnosed as pregnant, she is no longer eligible to receive Title X subsidized services. 42 CFR §59.8 (a)(2).

Although it is uniformly accepted that responsible pregnancy testing must include options counseling, particularly when the pregnant patient is an adolescent,[19] the new regulations prohibit such counseling and referrals.[20] Under the new

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[19] See, e.g., Morgan Decl. at 653A.

[20] Dr. Joseph D. Beasley, who testified before the Senate Subcommittee on Health, and whose study on the success of the Louisiana Family Planning Program was cited with approval by almost every Congressperson who testified in support of Title X, listed "referral to other medical services" as an essential component to any successful family planning program. Hearings on S. 2108 Before Subcomm. on Health of the Senate Comm. on Labor and

regulations, the patient may receive only a list of prenatal care facilities and general information about the preservation of fetal life. 42 CFR §59.8(2).

Limiting the information that pregnant patients may receive will delay poor women in obtaining prenatal care and in locating alternative services. Under current practice, most Title X providers immediately refer pregnant patients who wish to carry to term to a prenatal care service, often located in the same building as the family planning program. See Rust Decl. at 699A, Bennett Decl., at 495A, Tiezzi Decl. at 725A. In many cases, the Title X health provider will make the first prenatal care appointment for the patient to ensure that the patient

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Public Welfare, 91st Cong., 1st Sess. (Dec. 8, 1969) at 77.

follows through with care. The new regulations forbid this type of assistance.

Title X providers will not be permitted to inform pregnant patients which facilities in their professional judgment are superior. Because of her pregnancy, the poor woman or teen must be virtually abandoned by the Title X provider, even if she has enjoyed an ongoing relationship with the program as a family planning or counseling patient.

The mere provision of a list of prenatal care facilities is inadequate to ensure that pregnant adolescents will obtain prompt prenatal care. See, e.g., Tiezzi Decl. at ¶ 8(a)-(c); JA at 726-28A. In fact, providing such a list without additional counseling and information will almost always result in

delaying the adolescent's enrollment in a prenatal care program. Teens are often ill-equipped to navigate complicated social services systems, and are most prone to delay seeking follow-up health care. See Bennett Aff. at ¶ 12. JA at 498A. Impressionable teens who experience unintended pregnancy need nonjudgmental counseling "to inform them of all their options for pregnancy resolution and the associated risks and benefits of each -- abortion, parenthood, and adoption." National Academy of Sciences, Risking the Future, 1-2 1987.

For many pregnant adolescents who wish to carry their pregnancies to term, time is of the essence. Pregnant adolescents often suffer particular physical, social, and economic consequences of pregnancy. See Rosenfield Aff. at ¶ 17(a). For

example, maternal mortality, toxemia, anemia, premature childbirth and low birthweight occur at significantly higher rates for pregnant women under the age of 15 as compared to those 20-24 years of age. See Morley Aff. at ¶ 6; JA at 685A. Rosenfield Aff. at ¶ 17; JA at 685A. Medical risks are increased by the delay in prenatal care that the new regulations will create. See, e.g., Bennett Decl.; JA at 500A.

Lack of prenatal care is a particularly serious problem for poor African American and Hispanic communities. African American babies are twice as likely as white babies to be born to mothers who received late prenatal care or delivered their babies without having ever had a prenatal examination. CDF, Key Facts, supra, at 76. Almost one African American

baby out of ten is born to a mother who received late or no prenatal care. Id. Among African American teenage mothers under age 15, the proportion increases to two in ten. Id. Nearly 13% of Hispanic babies are born to mothers who received late or no prenatal care, compared to 4% of white babies.[21]

a. A disproportionate number of African American and other women of color suffer from serious health conditions that are exacerbated by pregnancy and will be at great risk under the new regulations.

Limiting the information that pregnant patients receive may have fatal consequences for patients who suffer from diseases that are exacerbated by pregnancy. African American and other women of color suffer disproportionately

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[21] Children's Defense Fund, The Health of America's Children: Maternal and Child Health 13 (1988).

from a variety of serious health conditions, such as high blood pressure, hypertension,[22] diabetes,[23] and certain forms of cancer,[24] which may be exacerbated by pregnancy. These women will face long-term health risks, or even death, when

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[22] Of women ages 25-44, from 1979-81, hypertension was prevalent 2.6 times more often in African American women than in white women. HHS, I Report of the Secretary's Task Force on Black and Minority Health 75 (1985) (hereinafter cited as HHS, Task Force.)

[23] HHS, Task Force, supra, at 75. African American women have a 50% greater incidence of diabetes than their white female counterparts. Native American women are ten times more likely than white women to have diabetes. Hispanic women who reside in poor urban areas or barrios were four times more likely to become diabetic than Hispanic women who reside in the suburbs. HHS, Office of Minority Health, Closing the Gap, "Diabetes and Minorities" 2 (1988).

[24] African Americans, Hawaiians, Chinese, and Native Americans are at the greatest risk for cervical cancer. Id. at 3.

Title X health practitioners fail to counsel them about the options for handling the risks of a continued pregnancy.

In some cases, continuation of pregnancy for women suffering from these illnesses may carry grave health consequences for both mothers and their fetuses. Chronic hypertension, for instance, may lead to a stroke during pregnancy.[25] In fact, hypertension is associated with up to 30% of maternal deaths and up to 22% of perinatal deaths.[26]

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[25] Stroke deaths are higher among African Americans than among whites. HHS, Task Force, supra, at 110. See, Rosenfield Aff. at ¶11; JA at 683A.

Both hypertension and diabetes can be controlled with proper medical treatment. Id. at 74. Nonetheless, hypertension accounted for more than 5% of excess African American deaths. Id. at 74.

[26] Task Force at 110. Rosenfield Aff. at ¶11; JA at 683A.

Pregnant diabetics run the risk of exacerbating debilitating vascular changes. See Rosenfield Aff. JA at 683A.

Certain forms of cancer are also more prevalent among women of color than whites. The mortality and incidence rates for cervical cancer, for example, are approximately 2.5 times higher for African American women than white women. HHS, Task Force supra, at 92. Continued pregnancy for these women may be life threatening.

Pregnant women with sickle cell anemia, a disease endemic to people of African descent,[27] may go into sickle cell shock and die as a result of pregnancy. Rust Decl. at ¶17 (a)-(b); JA at 705A-706A.

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[27] 50,000 African Americans have sickle cell anemia. Association for Sickle Cell Services Education Research and Treatment, Inc. Sickle Cell Anemia: A Family Affair (1988).

Perinatal mortality and spontaneous abortion are also risks to pregnant sickle cell patients. Rosenfield Aff. at ¶ 14; JA at 684A. Failure to provide such patients with the full range of information and options related to their medical condition and their pregnancy violates the most basic standards of medical practice.

Pregnant women who are HIV-positive must also be apprised of the full range of pregnancy options and provided with more than a referral list to prenatal care providers. Tragically, Acquired Immune Deficiency Syndrome (AIDS) has disproportionately impacted women of color and their newborn infants. The incidence of AIDS in Latina women is almost 11 times

that of white women.[28] Women account for 13% of all Latino AIDS death since 1980.[29] Fifty-two percent of all women with AIDS are African American, as are 59% of all children with AIDS under thirteen years old.[30]

A pregnant patient must be told of the risks to her health and to that of her child, particularly since pregnancy may accelerate the progression of HIV disease, AIDS and AIDS-related complex. See Minkoff Aff. at ¶7; Rust Decl. at ¶17(a); JA at 705A. A pregnant woman who tests HIV-positive should be counseled on how to protect herself and her partner. In some

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[28] Worth, D. and Rodriguez, R., "Latina Women and AIDS," SIECUS Report Jan.-Feb. 1987 at 5.

[29] Id.

[30] Weston, G., "AIDS in the Black Community," Au Courant, Fall 1986.

cases, it may be appropriate for the health provider to arrange an appointment for the patient at the appropriate referral agency, and provide the patient with information about support groups. The new Title X regulations contemplate abandoning such a patient, because as a pregnant woman, she is ineligible for Title X services.

Restrictions on the dissemination of medical information to poor women with grave health problems who use Title X facilities is particularly harmful since these women lack alternative sources of reliable health information. Withholding critical health information from poor pregnant women will sentence some women to death and others to long term health problems.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be reversed.

Respectfully submitted,

JULIUS LeVONNE CHAMBERS
CHARLES STEPHEN RALSTON*
SHERRILYN A. IFILL
MARIANNE ENGELMAN LADO
CHARLOTTE RUTHERFORD
99 Hudson Street
16th Floor
New York, NY 10013
(212) 219-1900

Counsel for Amici Curiae

*Counsel of Record

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APPENDIX

INTEREST OF AMICI CURIAE

THE NAACP LEGAL DEFENSE & EDUCTIONAL FUND, INC. ("LDF") is a non-profit corporation formed to assist African Americans to secure their constitutional and civil rights and liberties. For many years LDF has pursued litigation to secure the basic civil and economic rights of low-income African American families and individuals. Litigation to ensure the non-discriminatory delivery as well as the adequacy of health care and hospital services available to African American communities has also been a long-standing LDF concern. See e.g., Bryan v. Koch, 627 F.2d 612 (2d Cir. 1980) (Challenging the closing of Sydenham public hospital in Harlem under Title VI of the Civil Rights Act of 1964). LDF has also worked on

behalf of African Americans struggling with the burden of poor health and discriminatory and inadequate healthcare services.

LDF is particularly concerned with the growing rates of poverty among African Americans and with the number of single female-headed African American families that are living in poverty. LDF's Black Women's Employment Program strives to remove obstacles to employment in occupations where African American women are underrepresented and to provide access to jobs with better wages, decent comditions, and pension and health benefits. Health care for low-income uninsured women and their families is a matter of great concern to LDF. Through its Poverty & Justice Program, LDF is challenging the barriers to economic

advancement to help to improve the economic status and living conditions of the many in poverty.

This case implicates the full panoply of these important LDF concerns. It involves constitutional and statutory challenges to new regulations which prohibit federally-funded family planning clinics from providing abortion information services and referrals. These clinics' services are restricted to low and moderate income persons, a disproportionate number of whom are African American or are other women of color.

Limitations on the types of reproductive information and services provided by these clinics will disproportionately limit the range of reproductive options available to women of

color. This in turn will increase the number of unwanted pregnancies and promote continuing cycles of poverty and despair, while creating unnecessary medical risks for women of color.

For these reasons, LDF has filed this brief Amicus Curiae in support of petitioners' challenges to the validity of the new Title X regulations.

* * *

THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND (MALDEF) established in 1967, is a national civil rights organization headquartered in Los Angeles. Its principle objective is to secure, through litigation and education, the civil and constitutional rights of Hispanics living in the United States. Fundamental among those rights is the right to privacy which encompasses the

right to choose in matters of family planning. That right to choose is at issue in this case for the vast numbers of low income Hispanic Women who rely on federally-funded family planning clinics.

* * *

THE NATIVE AMERICAN COMMUNITY BOARD, of South Dakota, works for the advancement of Native American women by working on issues pertinent to health education, economic development, and treaty rights. The NACB also organizes women in self-help development and coalition building concerning reproductive rights. The NACB is a reservation based organization working with Native women locally, regionally, nationally and internationally. The NACB serves reservation based Native American women.

We promote equality of health care, access to health care and believe that Native American Women should have access to true and concise information in order to be able to make appropriate decisions regarding their lives. By denying or withholding certain information to women can only compromise a life. Native American women suffer with high rates of diabetes, high blood pressure, TB, and other conditions which are life threatening especially when complicated with pregnancy.

* * *

THE NATIONAL URBAN LEAGUE founded in 1910, is the premier social service and civil rights organization in America. The League is a non-profit, community based agency headquartered in New York City, with 114 affiliates in 34 states and the

District of Columbia. Its principal objective is to secure equal opportunity for African-Americans and other minorities in every aspect of American life. The National Urban League supports full access to comprehensive reproductive health services for African-American women and their families. The Title X Program also represents a key source of primary health care for low-income African-American women.

* * *

THE BLACK, ASIAN PACIFIC, HISPANIC, AND NATIVE AMERICAN CAUCUSES OF THE NATIONAL WOMEN'S POLITICAL CAUCUS is a bi-partisan, grassroots, membership based organization dedicated to political representation and full participation of all women in government and community life. The Asian Pacific, Black, Hispanic

and Native American Caucuses are deeply concerned with women's fundamental right to choose abortion, particularly women in poor communities who already suffer from inadequate and restricted access to health care services.

* * *

THE WOMEN OF COLOR PARTNERSHIP PROGRAM OF THE RELIGIOUS COALITION FOR ABORTION RIGHTS, located in Washington, D.C., is a national effort to educate women of color concerning public policies surrounding the issue of reproductive choice and its disproportionate affect on women of color. As the injustices of racism, sexism and classism engulf the day-to-day choices available to African-American, Latin American, Native American and Asian/Pacific American women, access to reproductive health care affectrs every

element of our lives. This program seeks to identify and address not only reproductive rights issues but also reproductive health care concerns from the unique perspectives of women of color to include: (1) the right to choose or not to choose abortion; (2) family planning and all methods of birth control; (3) teen pregnancy; (4) prenatal care; (5) child care; and (6) medical abuses against women of color.

This organization is extremely concerned about the continued existence and perpetuation of illegal abortions, sterilization abuse, forced Caesarian sections, the use of Depo-provera, and the lack of sufficient prenatal care for women of color. The economics of this country dictates that the "haves" may choose to purchase whatever health services they may

need or want. The "have nots" hold very few choices in their lives and in many instances must rely on the federal government. We are concerned about the numerous public policies which create a negative impact on the ability of women of color to make a difficult decision, the unnecessary sacrifices that she and her family may have to make because of a lack of resources and the degradation that she must undergo to carry out her decision. We believe that all women, regardless of race or class, should have access to a safe and legal abortion. Lastly, we believe that the right to choose abortion is a personal decision to be respected and made in consultation with a woman's doctor, her family with spiritual guidance but without governmental interference.

* * *

THE AMERICAN INDIAN HEALTH CARE ASSOCIATION promotes the health status of Native Americans by supporting overall improvement of health care. AIHCA represents 36 urban Indian health programs, which provide health services to Native Americans living in urban areas. Native American women are amongst the poorest groups in the nation. Financial barriers to health care have contributed to decreased access and poorer health. It is important that Native American women retain options in their pre-natal health care and family planning activities. High rates of teenage pregnancy and concommitantly, increased infant mortality can only be exacerbated by decreased access to Title X funded program.

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THE MEXICAN AMERICAN WOMEN'S NATIONAL ASSOCIATION of Washington, D.C. is committed to improving the quality of life for all Hispanic women.

* * *

UNITED CHURCH OF CHRIST OFFICE FOR CHURCH IN SOCIETY. Standing in the Hebrew Christian tradition we affirm God as the server of life, our life, all life, life to the fullest. She has called us to share the world of Creation with her, giving us the privileges and responsibilities of fellowship in the wider units of society. Thus, we affirm the freedom with which God endowed men and women, but we affirm and receive this as a freedom bound to responsibility. At its best our Western legal tradition as well, has served the dual purpose of protecting human freedom and helping human beings to

discharge their responsibilities to one another.

Our religious heritage has also stressed reverence for human life. Accordingly, the enhancement of human life and the protection of the rights of persons, particularly those who are oppressed because of their race, sex or class. As an agency of the United Church of Christ, we find it neither likely or desirable that organized society would disavow its responsibility in this regard.

* * *

THE NATIONAL INSTITUTE FOR WOMEN OF COLOR (NIWC) is a non-profit, public interest organization dedicated to helping women of color achieve equity in all aspects of U.S. society, most particularly in educational attainment and economic achievement. Women of color (i.e.,

Hispanic, African American, Asian American, Pacific Islander, American Indian, or Alaska Native) are disproportionately represented among low-income and public assistance clients and, therefore, have little option but to use publicly funded family planning clinics. Women of color, disadvantaged by economic status caused by race/ethnicity and gender discrimiantion, are disadvantaged again when pregnancy is diagnosed in a clinic funded under Title X. Moreover, because this population often suffers from poor nutrition, unattended health conditions, and multiple disabilities (hypertension, Sickle Cell Anemia, for example), the risk of carrying a pregnancy full-term may endanger the mother's life. Certainly, the potential of greater economic distress brought on with the unintended birth of a

child is another type of hazard. In effect, the restrictive regulations for Title X place women of color in the greatest jeopardy. NIWC recognizes this jeopardy as an issue related to its mission and thereby wishes to lend its support through the amicus brief.

* * *

THE NATIONAL BLACK WOMEN'S HEALTH PROJECT is a health, education and advocacy organization that works to improve the quality of life for African American women. It works to promote non-discriminatory approaches to insure that all African American women have access to health services, including abortion, that maximize maternal health, reduce infant mortality and produce healthy babies. Because poor African American women are particularly vulnerable to economic

hardship, the impact of restrictions on health services will be particularly severe for them.

* * *

THE NEW YORK CITY COMMISSION ON HUMAN RIGHTS ("The Commission") is a local administrative agency charged with eliminating all prohibited forms of discrimination within the City of New York, including race, national origin and age discrimination in access to health services. N.Y.C. Admin. Code Sec. 8-101 et seq. The Commission adjudicates claims of discrimiantion in access to pblic accommodations under local law.

The Commission takes seriously its public charge that all women in New York be afforded full access to quality health services free from discrimination on the basis of race, national origin and age.

Thus, the commission is deeply concerned about the ways in which restrictions on Title X funding would disproportionately limit the access of young women of color to full and complete health care.

* * *

THE NATIONAL MEDICAL ASSOCIATION, founded in 1895, represents 16,000 Black physicians in the United States, including Puerto Rico and the Virgin Islands. The National Medical Association seeks to foster the enactment of just medical laws and to educate the public concerning all matters affecting public health, especially matters affecting the socio-economically disadvantaged and the health care of women. The National Medical Association supports the common struggle for reproductive choice and the equality of women.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

WEST VIRGINIA ASSOCIATION OF COMMUNITY HEALTH CENTERS, ET AL.

Plaintiffs,

v. C.A.____

LOUIS SULLIVAN, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant.

AFFIDAVIT

I, Bruce Berry, M.D., depose and say:

1. That I am Vice Chairman of the West Virginia Section of District 4 American College of Obstetricians and Gynecologists ("ACOG").

2. That I have been Vice Chairman since 1986, and an active member in ACOG since 1973 as a Junior Fellow and a Fellow

since 1978, and board certified in obstetrics and gynecology since 1978.

3. That I submit this affidavit in support of the motion to enjoin implementation of regulations promulgated by the United States Department of Health and Human Services under Title X of the Public Health Service Act. I submit this affidavit in my capacity as the Vice Chairman of the West Virginia Section of District 4 of ACOG, a National medical association of more than 27,000 physicians specializing in the delivery of health care to women.

4. That the West Virginia Section of ACOG has taken a position against implementation of the previously described regulations, and that the position of the West Virginia Section is the same as that set forth by the affidavit of George W.

Morely, President of American College of Obstetricians and Gynecologists. (Commonwealth of Massachusetts v. Otis Bowen, United States District Court for the District of Massachusetts, Civil Action No. 88-0253-S, February 9, 1988), which is attached and herein incorporated.

5. That if Title X regulations prohibit post-pregnancy counseling, or clinics lose their Title X funding, many poor teenage family planning clients would not have available to them a full range of pregnancy counseling services including options counseling. Thus denied complete medical care, such clients would be deprived of the benefits of Title X Public Health Services previously delivered.

6. That given the demographics of West Virginia, to the extent that any Title X clients would have sought abortion

services, the provisions of these services will be thwarted altogether or delayed to a more hazardous stage of a woman's pregnancy.

7. That given my understanding of who could be on the referral list, it appears that a doctor would feel an obligation to counsel a pregnant women on all her options, including abortion, that that doctor could not be on the referral list and that would caused a great ethical concern for the physicians in the community.

8. That the ramifications of the implementation of the regulations are especially devastating to the obstetrics and gynecological community in West Virginia in that in the last five years the number of obstetricians and gynecologists in West Virginia has been

greatly reduced from 130 to 80. The regulations would place a heavy burden on the remaining obstetricians and gynecologist in West Virginia because it would force many Centers to close and encourage competent physicians to leave the State.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 22nd day of March, 1989.

/s/ Bruce Berry, M.D.
Bruce Berry, M.D.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, ET AL.	)	
Plaintiffs,	)	
v.	)	C.A.
OTIS R. BOWEN, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES	)	
Defendant.	)	

AFFIDAVIT

I, Diane M. Booth, depose and says:

1. That I am the Executive Director of Planned Parenthood of Central Missouri ("PPCM").

2. That I have served in this position for fifteen months.

3. That PPCM receives money under the U.S. Department of Health and Human Services' Title X family planning services

program as a delegate agency of the Missouri Community Health Corporation.

4. That the Title X funding in fiscal year 1987 represented seventeen percent (17%) ($168,000) of PPCM's operating budget.

5. That PPCM operates four clinics -- in Columbia, Jefferson City, Fulton, and Moberly -- covering ten counties.

6. That the Columbia clinic that provides a full range of family planning services also provides abortion services as well as housing PPCM's administration offices.

7. That the Columbia clinic is the only facility providing first trimester abortion services between Kansas City and St. Louis.

8. That the Columbia facility consists of one building, with one waiting

room, one reception area, one laboratory, one parking lot, and one entrance in operation (there is a second entrance to the building tnat is not in use).

9. That the Medical Director of PPCM provides abortion services at the Columbia clinic, and that some of the health professional staff also rotate between family planning and abortion services.

10. That PPCM has one personnel, accounting, and payroll system for all of its operations.

11. The PPCM currently prevents Title X funds from being used to fund abortion services by requiring staff to keep detailed time sheets and by allocating program income used for overhead costs by a cost allocation plan.

12. That if it were a requirement of the Title X program that abortion services

be totally separated (including total physical separation), PPCM would be forced to find another building for its abortion services, hire new staff, and reconfigure its administrative systems -- an extremely expensive venture.

13. In the event that total separation of services is required at the Columbia clinic, it is likely that PPCM would opt not to receive Title X funding, thereby reducing the opportunity for low-income people to receive family planning services.

14. That discussions with a number of the health care professionals on my staff indicate that they believe a ban on post-pregnancy counseling would force them to violate their medical ethics as well as expose them to medical malpractice liability.

15. That it would be impossible for PPCM to run a Title X program with a ban on post-pregnancy counseling in place because my staff would refuse to work under those conditions.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 14th day of December 1987.

/s/ Diane M. Booth
Diane M. Booth

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, ET AL.

Plaintiffs,

v.

OTIS R. BOWEN, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

Defendant.

C.A.

AFFIDAVIT

I, Karen Cody Carlson, depose and say:

1. That I am the Executive Director of Planned Parenthood of Greater Kansas City ("PPGKC").

2. That I have served in this position for two years and three months.

3. That PPGKC receives money under the U.S. Department of Health and Human Services' Title X family planning services

program as a delegate agency of the Missouri Community Health Corporation.

4. That the Title X funding in fiscal year 1987 represented nine percent (9%) ($200,000) of PPGKC's operating budget.

5. That approximately 65% of the 15,000 clients seen last year received at least some subsidization under Title X.

6. That PPGKC operates four clinics covering the Kansas City metropolitan area and another clinic in Warrensburg, approximately 50 miles away.

7. That the largest of the Kansas City clinics provides a full range of family planning services as well as abortion services up to fourteen weeks of pregnancy.

8. That the Medical Director of PPGKC performs abortions in the Kansas City clinic, and several of the professional

staff rotates between family planning and abortion services.

9. That the co-located facility consists of one building, with one waiting room, one reception area, and one entrance in operation.

10. That PPGKC has one personnel, accounting, and payroll system for all of its operations.

11. That PPGKC currently prevents Title X funds from being used to fund abortion services by requiring clinic staff to keep detailed time records and by allocating overhead costs by budget and square footage as well as the salary for the Director of Patient Services by either budget or actual time spent on either service.

12. If the Title X regulations required that abortion services be totally

separated (including total physical separation), PPGKC would be forced to find another building for its abortion services, hire new staff, and reconfigure its administrative systems -- an extremely expensive venture.

13. In the event that total separation of services is required, it is very likely that PPGKC would opt not to receive Title X funding and require all patients to pay at least a partial percentage of the shares for services, thereby reducing the opportunity for low-income people to receive family planning services.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 18th day of December 1987.

/s/ Karen Cody Carlson
Karen Cody Carlson

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

WEST VIRGINIA ASSOCIATION OF COMMUNITY HEALTH CENTERS, ET AL.

Plaintiffs,

v. C.A.____

LOUIS SULLIVAN, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant.

AFFIDAVIT

I, Catherine Groom, depose and say:

1. That I reside at 1415 Third Avenue, Charleston, West Virginia 25312.

2. That I am 25 years of age and have been a patient at the Women's Health Center of West Virginia, Inc. (the "Center") since 1983.

3. That my expectation has always been that I would receive the same

treatment at the Center as I would from a private gynecologist.

4. That part of that expectation as to service if it was determined that I was pregnant, would be discussions with a counselor about the health consequences of my pregnancy, what my options and alternatives are, and where I could go for further treatment. I am especially concerned about the regulations because it is my understanding that I may be at risk to have another child. If I were to become pregnant, I would want immediate counseling about my options.

5. That if I were told that I was pregnant and was then simply handed a list of prenatal health care providers with no explanation or discussion, I would have no way of evaluating the names on that list and would have no idea which name I should

go to see for counseling and information. I would feel frustrated and mad.

6. That I have in the past recommended to people whom I know that they use the Center precisely because the staff at the Center provides complete information and counseling to people with low incomes.

7. That if the Center no longer were to provide post-pregnancy counseling, I would not go to the Center, and I would tell people that I know not to go to the Center.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 22 day of March, 1989.

/s/ Catherine Groom
Catherine Groom

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

WEST VIRGINIA ASSOCIATION OF COMMUNITY HEALTH CENTERS, ET AL.	)	
Plaintiffs,	)	
v.	)	C.A.____
LOUIS SULLIVAN, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,	)	
Defendant.	)	

AFFIDAVIT

I, Margie F. Hale, depose and say:

1. That I am Executive Director of The Women's Health Center of West Virginia, Inc. ("The Center").

2. That I have been its Executive Director since May 1987. My duties at The Women's Health Center are supervision of the day-to-day operations of the Center, including responsibility for personnel

management, financial affairs and public relations.

3. That the Center serves Kanawha County for family planning services.

4. That other than family planning services, the Center also provides obstetrics and gynecological services; birth services; family and individual counseling; abortions, and case management for pregnant teens, which includes counseling and assistance for those clients who wish to have their babies and keep them. Assistance includes housing, post birth medical care, transportation for pre-natal care, etc.

5. That the Center receives funds under the United States Department of Health and Human Services Title X Family Planning Services Program as a delegate

agency of the West Virginia Department of Health.

6. That in fiscal year 1988, the Center's Title X grant was $62,000, which represents 8.3% of the Center's $750,000 total operating budget.

7. That the Center served 2,000 unduplicated family planning clients during 1988. Because of the limited number of practitioners, the Center is not able to meet the need for family planning services in this area.

8. That if Title X regulations ban the co-location of family planning services and abortion services, the Center would terminate its family planning services. The Center would not conduct a family planning program which is prevented from counseling clients on the full range of family planning options because such

counseling would violate well accepted medical ethics as observed by our Staff. Additionally, it is not economically feasible for the Center to open separate facilities for our family planning-related services on the one hand and our abortion-related services on the other.

9. That in 1988, the Center performed 555 pregnancy tests of which 42% were positive. The clients who have had pregnancy tests frequently immediately ask us questions about what options are available to them with respect to their pregnancy.

10. That the health professionals on my staff feel that a ban on post-pregnancy counseling involving a full range of options would force them to engage in unethical medical practices.

11. That if Title X regulations banned the full range of post-pregnancy counseling respecting options, the Center would find it exceedingly difficult to continue to provide Title X services because qualified health care professionals would not agree to work for the Center.

12. Our clients who are told that they are pregnant expect to discuss the consequences of their pregnancies and their options with my staff. If we provided no post-pregnancy counseling or limited post-pregnancy counseling, our clients would feel frustrated and angry and would likely not return to the Center and would tell other people not to use the Center's services.

13. That the Women's Health facility consists of two offices side by side with

one unrelated office between them. One office is used solely for the Birthing Center and the other office is used for all other services provided by the Center, including family planning, gynecological service, counseling and abortions.

14. That the Center has one personnel system, one accounting system, and one payroll system for all of its operations.

15. That the Center has been able to comply with Section 1008's prohibition on the use of Title X Federal funds to advocate family planning by several methods: (1) the Center does not and has never advocated abortion as a means of family planning; (2) abortion and family planning are never offered at the same time; (3) separate patients records are maintained for family planning clients and abortion clients; (4) the primary staff

involved in abortions on the one hand and family planning on the other are different individuals.

16. That the Women's Health Center has never been found to violate the Federal statute heretofore and our activities have always been consistent with the requirements of the Department of Health and Human Services.

17. That if the Title X regulations require that abortion services be totally separated physically and financially from the family planning services offered by the Center, the Center would be required to find another building for one or the other of its services, hire new staff, reconfigure its systems, all of which are beyond the financial wherewithal of the Center.

18. All Title X funds are used exclusively in the family planning program and not in the provision of abortion services.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 22 day of , 1989.

/s/ Margie Hale
Margie F. Hale

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, ET AL.	)	
Plaintiffs,	)	
v.	)	C.A.
OTIS R. BOWEN, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES	)	
Defendant.	)	

AFFIDAVIT

I, Leslie Tarr Laurie, depose and say:

1. That I am the Executive Director of Family Planning Council of Western Massachusetts ("FPCWM").

2. That I was the founder of FPCWM and have been its Executive Director for fifteen years.

3. That FPCWM receives money under the U.S. Department of Health and Human

Services' Title X family planning services program directly from HHS.

4. That the Title X funding in fiscal year 1987 was $564,664, representing approximately forty percent (40%) of FPCWM's operating budget.

5. That FPCWM served approximately 13,000 clients in the past year. There are an estimated 45,000 clients our service delivery area that are in need of affordable family planning services.

6. That FPCWM operates eleven clinics covering 3000 square miles in Western Massachusetts. In many of the rural areas, FPCWM's clinics are the only source of reproductive health care available.

7. That in all of its clinics, FPCWM provides comprehensive family planning services. Two of its clinic sites are co-

located with other organizations that provide abortion services.

8. That if Title X regulations banned the co-location of family planning with abortion services, FPCWM would be forced to terminate family planning services in two geographical areas because it would not be economically feasible to open separate facilities.

9. That in 1986, FPCWM performed 2738 pregnancy tests.

10. That conversations with health professionals on my staff indicate that they believe a ban on post-pregnancy counseling would force them to engage in unethical practices.

11. That if Title X regulations banned any post-pregnancy counseling, FPCWM would find it exceedingly difficult to continue to provide Title X services because

qualified health care professionals would refuse to work for FPCWM.

12. That our clients who are told that they are pregnant expect to discuss the consequences of their pregnancies and their options with our staff. If FPCWM provided no post-pregnancy counseling, clients simply given a list of prenatal health care services would feel frustrated and angry. They would most likely not return to FPCWM and would tell other people not to use FPCWM's services.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this ___ day of December 1987.

/s/ Leslie Tarr Laurie
Leslie Tarr Laurie

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WEST VIRGINIA

WEST VIRGINIA ASSOCIATION OF COMMUNITY HEALTH CENTERS ET AL.	)	
Plaintiffs,	)	
v.	)	C.A.
LOUIS SULLIVAN, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES	)	
Defendant.	)	

AFFIDAVIT

I, Susan B. Walter, depose and say:

1. That I am the Executive Director of Shenandoah Community Health Center of Intercounty Health, Incorporated.

2. That I have been its Executive Director for 3-1/2 years.

3. That I received a Master in Social Work from West Virginia University and have worked as an administrator in the

community health field for the past nine years.

4. That Shenandoah Community Health Center is a community health center providing comprehensive health care services to all in the community regardless of their ability to pay. Patients served by Shenandoah Community Health Center reside in Berkeley, Jefferson, Morgan, Mineral, Hampshire, and Hardy counties of West Virginia. Between June through November each year Shenandoah Community Health Center also provides health care services to migrants and seasonal farmworkers in those same West Virginia counties and in northwestern Virginia and Maryland.

5. That Shenandoah Community Health Center's focus is on prevention, education, and managed care.

6. That in 1988 Shenandoah Community Health Center served 12,729 patients with 47,907 patient visits for medical care, social services, and WIC nutrition services. 2,825 of these patients were migrant and seasonal farmworkers with limited or no fluency in English or access to health care.

7. That the Shenandoah Community Health Center receives Title X funding through the West Virginia State Department of Health, which in turn receives its Title X funding from the U.S. Department of Health and Human Services.

8. That most family planning services provided to the clients seen by Shenandoah Community Health Center are subsidized, at least in part, by Title X.

9. That last year Shenandoah Community Health Center provided Title X

family planning services to 1,446 clients with over 2,950 visits. 725, 50%, of these clients were 19 years of age and under.

10. That in 1988, Shenandoah Community Health Center performed approximately 1,200 pregnancy tests.

11. That Shenandoah Community Health Center health professionals indicate that they believe a ban on post-pregnancy counseling would force them to engage in unethical practices.

12. That if Title X regulations banned any post-pregnancy test counseling, Shenandoah Community Health Center would find it exceedingly difficult to continue to provide Title X services because qualified health care professionals could not violate their professional ethics by withholding information from patients and

by not responding to patients' requests about their options.

13. That Shenandoah Community Health Center could not afford to organize the physical, financial, personnel and record keeping separation required by the new Title X regulations.

14. That it is my understanding that by not providing a continuity of comprehensive health care information to our patients, Shenandoah Community Health Center would violate the intent of Public Health Service 329 and 330 funding, major funding sources for Shenandoah Community Health Center.

15. That I, as an Executive Director of a community health center, am pledged to advocate for the needs of the medically underserved and am responsible for ensuring the provision of quality

comprehensive health care services to all Shenandoah Community Health Center patients. Denying a continuum of information and services to a particular group of patients would be discriminatory and would violate my leadership and personal integrity.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 21st day of March, 1989.

/s/ Susan B. Walter
Susan B. Walter, M.S.W.
Executive Director

STATE OF WEST VIRGINIA

COUNTY OF BERKELEY:

Subscribed and sworn before me this 21st day of March, 1989.

June N. Cutlip, Notary Public

My commission expires August 21, 1991.

(17) (16)

Nos. 89-1391 and 89-1392

Supreme Court, U.S.
FILED
OCT 4 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DR. IRVING RUST, *et al.*,

Petitioners,

v.

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

THE STATE OF NEW YORK, *et al.*,

Petitioners,

v.

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, THE AMERICAN ACADEMY OF FAMILY PHYSICIANS, THE AMERICAN FERTILITY SOCIETY, THE AMERICAN MEDICAL ASSOCIATION, THE AMERICAN MEDICAL WOMEN'S ASSOCIATION, INC., THE AMERICAN PSYCHIATRIC ASSOCIATION, AND THE PHYSICIANS FOR REPRODUCTIVE HEALTH AS AMICI CURIAE IN SUPPORT OF PETITIONERS

CARTER G. PHILLIPS *
MARK E. HADDAD
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

* Counsel of Record

July 27, 1990

[Additional Counsel Listed on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

Of Counsel:

ANN E. ALLEN
AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS
409 12th Street, S.W.
Washington, D.C. 20024
(202) 638-5577

JACK R. BIERIG
DAVID F. GRAHAM
LYNN D. FLEISHER
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

R. MICHAEL MILLER
ELIZABETH GALLUP
AMERICAN ACADEMY OF FAMILY PHYSICIANS
8880 Ward Parkway
Kansas City, Missouri 64114-2797
(800) 274-2237

KIRK B. JOHNSON
EDWARD B. HIRSHFELD
DAVID ORENTLICHER
AMERICAN MEDICAL ASSOCIATION
535 North Dearborn Street
Chicago, Illinois 60610
(312) 645-4600

LAURIE R. ROCKETT
HOLLYER, JONES, BRADY, SMITH, TROXELL, BARRETT & CHIRA
342 Madison Avenue
New York, N.Y. 10173
(212) 818-1110
(Counsel to the American Medical Women's Association)

JOEL I. KLEIN
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184
(Counsel to the American Psychiatric Association)

JACQUELINE C. LEIFER
FELDESMAN, TUCKER, LEIFER, FIDEL & BANK
2001 L Street, N.W.
Washington, D.C. 20036
(202) 466-8960
(Counsel to Physicians for Reproductive Health)

QUESTIONS PRESENTED

Amici will address the following questions:

(1) Whether an agency may alter its longstanding interpretation of a statute in a manner that raises serious constitutional questions in the absence of any clear, affirmative evidence that Congress intended such an interpretation.

(2) Whether the Secretary's regulations violate the First Amendment's proscription against viewpoint discrimination.

(3) Whether the Secretary's regulations unduly burden and affirmatively interfere with a woman's fundamental right to make important medical treatment decisions.

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INTEREST OF *AMICI CURIAE*

Amici curiae are seven major organizations of health care professionals. *Amici* share an abiding dedication to promoting the public welfare through the maintenance of the highest professional standards and the provision of quality health care. *Amici*'s interest is not in debating the philosophical, ethical, moral or religious issues surrounding abortion. Indeed, their members hold divergent views on some of these issues.

The American College of Obstetricians and Gynecologists ("ACOG") is a private, voluntary, nonprofit organization of physicians who specialize in obstetric and gynecologic care. ACOG is the leading group of professionals providing health care to women. Its 29,500 members represent approximately 90% of all obstetricians and gynecologists practicing in the United States. ACOG believes that every person has a fundamental right to make individual medical treatment decisions free of unwarranted government interference, particularly interference with the type of information that a physician can provide to a patient who must make an important medical treatment decision.

The American Academy of Family Physicians ("AAFP") is a private, voluntary, non-profit professional organization, representing 69,000 family physicians throughout this country. The AAFP was founded in 1947 and was instrumental in the establishment of family practice as a primary medical specialty. The Academy's interest stems from the potentially significant impact of this case on the family physicians' responsibility to and relationship with the families they serve.

The American Fertility Society ("AFS") is a voluntary, nonprofit organization of over 10,000 physicians and scientists—the majority of whom are obstetricians-gynecologists—dedicated to advancing knowledge about and treating disorders of the reproductive system. AFS opposes laws that prevent physicians from offering all available, medically appropriate treatment options to their patients.

The American Medical Association ("AMA") is a private, voluntary, non-profit organization of physicians. The AMA was founded in 1846 to promote the science and art of medicine and to improve the public health. Its 280,000 members—over half of all physicians currently licensed to practice medicine—practice in all fields of medical specialization. The AMA opposes the regulations at issue to the extent that they will force physicians to deviate from accepted standards of medical practice and ethics. The AMA has concluded that it is not necessary to reach the constitutional issues presented in this case that are addressed in this brief in Parts II and III of the Argument. Nevertheless, to avoid filing a separate brief, which would burden "the staff and facilities of the Court," Sup. Ct. R. 37.1, the AMA joins the brief subject to the limitation described above.

The American Medical Women's Association, Inc. ("AMWA"), founded in 1915, is a nonprofit organization of 12,000 women physicians and medical students, one of whose primary missions is to promote quality health care for women. AMWA strongly opposes laws which adversely affect the health of women, or impose constraints on the right of the pregnant patient, in consultation with her physician, to make a personal and medically informed decision whether or not to continue a pregnancy.

The American Psychiatric Association ("APA") is the nation's largest professional association specializing in psychiatry, with a membership exceeding 30,000 physicians. APA's purposes include promoting the welfare of patients who require psychiatric services.

The Physicians for Reproductive Health is a private, voluntary, nonprofit organization of more than 700 physicians and medical students. The primary mission of its membership is to highlight issues that will improve the availability and quality of reproductive health care.

Under a longstanding interpretation set forth by the Secretary of Health and Human Services (Secretary) implementing Title X of the Public Health Service Act, 42 U.S.C. §§ 300-300a-41 (1982) ("Title X"), physicians in Title X programs have been able to provide family planning assistance in accordance with accepted ethical and legal standards of medical care. The Secretary promulgated new regulations in 1988, however, which prohibit Title X physicians from providing medically appropriate counseling and referrals, and which threaten seriously to compromise the health of patients that many of *amici*'s members serve. The Secretary's scheme also would impose upon physicians an intolerable choice—either to comply with conditions that contravene fundamental medical principles and requirements of state law or forgo providing vital health services to those who desperately need them. In light of these serious threats to patient health and the integrity of medical practice, *amici* wish to present their views.[1]

STATEMENT

Title X provides substantial funding—on average 50 percent of operating costs—to over 3900 family planning clinics nationwide. Pet. App. 78a-79a (Morley ¶ 6). These clinics, which also are supported by state, local and private funds, serve 4.5 million women each year. *Id.* The women who come to these clinics typically have no other source for nonemergency health care. *Id.* at 78a (Joseph ¶ 5); 85a (Fink ¶ 10). The vast majority have very low incomes, and approximately one-third are adolescents. Supp. Pet. 4sa.

Family planning clinics provide their patients with a wide range of vital medical services. In addition to information and counseling regarding contraception, family planning clinics must provide "general repro-

[1] Pursuant to Rule 37 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

ductive health care," including "physical examinations, screening for breast cancer [and] treatment of gynecological problems," 53 Fed. Reg. 2922, 2926-27 (1988), as well as diagnostic tests (*e.g.*, pap smears, cultures, and blood tests) for a variety of diseases (*e.g.*, cancer, gonorrhea, AIDS). Pet. 4 n.5. Clinics also must provide a range of infertility services, including "education, examination, appropriate laboratory testing, counseling and appropriate referral." 53 Fed. Reg. at 2926. Finally, clinics must provide pregnancy tests—a common reason for many initial visits—and "facilitate access to prenatal care and social services." *Id.* at 2927.

In providing federal funds to family planning clinics, Congress intended to ensure that a low-income woman would not be denied access to these basic medical services "because of her economic condition." H.R. No. 91-1472, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 5068, 5073. Consistent with this intent, the clinics are staffed by fully licensed physicians and counselors who provide services that are consistent with the basic principles of medical care and that are subject to the basic requirements of state law in regulating the quality of those services.

A. Medical Background

A fundamental principle of medical ethics, which applies equally to the health care services offered in family planning clinics as in any other context, is that physicians must respect the autonomy of the patient. At its most basic level, respecting a patient's autonomy means recognizing that "[t]he patient should make his own determination on treatment." *Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association* (hereinafter "AMA Opinions") ¶ 8.08 (1989). This principle, which has deep roots in the medical tradition, is grounded solidly in the common law. *Cruzan* v. *Director*, No. 88-1503, slip op. at 5 (June 25, 1990). It is also the foundation for other ethical and legal obligations imposed upon the physician.

Central among these is the requirement that a physician must provide a patient with all information necessary for the patient to make an informed decision about whether to pursue a given treatment. As ACOG has stated:

> The principle of autonomy requires that a patient be given complete and truthful information about her medical condition and about any proposed treatment. Only with such information is she able to exercise her right to make choices about health care.

ACOG, *Ethical Decision-Making in Obstetrics and Gynecology*, Technical Bulletin No. 136, 3 (Nov. 1989); see AMA Opinions ¶ 8.08 (the "physician's obligation is to present the medical facts accurately to the patient"). Through the doctrine of informed consent, the ethical obligation fully to disclose the relevant medical information "has become firmly entrenched in American tort law." *Cruzan*, slip op. at 5. See, *e.g.*, *Unthank* v. *United States*, 732 F.2d 1517, 1521 (10th Cir. 1984) (physician must disclose "any material information important to choosing a course of treatment").

Similarly entrenched in the common law and medical ethics are the responsibilities that flow from the trust on which the physician-patient relationship is based. "Because patients must be able to rely on their physicians to act in good faith and in their best interest," the common law treats the duties owed by doctors to patients as "fiduciary" in nature. Pet. App. 84a, Katz ¶ 7; see *Lambert* v. *Park*, 597 F.2d 236, 239 n.7 (10th Cir. 1979). Once having begun to serve a patient, a physician is ethically and legally obligated to speak honestly with that patient. *E.g.*, *Natanson* v. *Kline*, 350 P.2d 1093, 1102-03 (Kan. 1960). In particular, physicians' "high ethical obligation to avoid coercion and manipulation of their patients" requires physicians to avoid "the withholding or distortion of information in order to affect the patient's beliefs and decisions." 1 President's Commission for the Study of Ethical Problems

in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions* 68, 67 (1982).

Finally, it is fundamental to sound medical practice that a physician never neglect or abandon a patient under his or her care. AMA Opinions ¶¶ 3.5, 8.10; Pet. App. 83a-84a (Katz ¶ 6). Regardless of what particular services a physician may directly provide, a physician must inform a patient of all medical services that a patient might reasonably consider.[2] Should the patient request or require medical services that the physician lacks " 'the requisite skill, knowledge, or facilities' " to provide, the physician is obligated " 'to advise his patien[t] to consult a specialist.' " *Dewes* v. *Indian Health Servs.*, 504 F. Supp. 203, 208 (D.S.D. 1980) (quoting J. Director, 35 ALR 3d 349, 358 (1971)); see *Haley* v. *United States*, 739 F.2d 1502, 1507 (10th Cir. 1984) (physician has a duty to refer to specialist). Such referrals must be made only to competent and appropriate providers. AMA Opinions ¶ 3.04.

Each of these fundamental principles finds important and regular application in the family planning context. The need for trust and candor in the physician-patient relationships in a Title X clinic is particularly acute, because these clinics provide the only non-emergency health care treatment many of their patients will receive. For a typical patient, a physician might perform a general physical examination and diagnostic tests. Should any abnormalities be detected, the physician would be obliged to explain these findings to the patient, explain the alternatives available, and provide the service selected by the patient or refer the patient to an appropriate provider.

[2] While the Secretary correctly states that an individual physician may, consistent with medical ethics, refrain from providing a particular *treatment*, he errs in concluding that there is nothing medically unethical about the government restricting physicians from providing *information and counseling about a particular treatment*. 53 Fed. Reg. at 2929. A physician may not deprive a patient of information regarding medically appropriate treatments needed to make a fully informed medical decision, even if the information concerns treatments that the physician does not perform. For example, it would be medically unacceptable for an oncologist not to disclose or discuss with cancer patients the possibility of surgery merely because the physician performs only radiation and chemotherapy. See Pet. App. 83a (Rosenfield ¶ 22); see *Smith* v. *Karen S. Reisig, M.D., Inc.*, 686 P.2d 285 (Okla. 1984).

From a medical perspective and as a matter of state law, the termination of a pregnancy is one of the therapeutic and legally available alternatives that a physician may, and in some cases must, discuss with a pregnant woman. Providing information promptly about all medical options, including abortion, becomes imperative for women suffering from a medical condition that is exacerbated by continuation of pregnancy, and for whom pregnancy may pose serious health risks. Pet. App. 81a (Sammons ¶ 8). For example, for the 1.5 million women of child-bearing age who suffer from diabetes, the risks of pregnancy include a fourfold increase in the likelihood of hypertensive disease, an increase in the likelihood and severity of infection, and increased incidence of complications during and following delivery. R. Creasy & R. Resnik, *Maternal-Fetal Medicine* 925 (2d ed. 1989); J. Pritchard, P. MacDonald & N. Grant, *Williams Obstetrics* 600 (17th ed. 1985). Pregnancy also poses significant health risks for women suffering from a neurologic disease such as multiple sclerosis, myasthenia gravis, post-poliomyelitis or epilepsy, as well as for women with certain types of renal disease or sickle cell disease. J. Butler & D. Walbert, *Abortion, Medicine, and the Law* 253 (3d ed. 1986). The risks are even more serious for women with certain cardiovascular disorders, such as primary pulmonary hypertension or congenital heart disease, for whom pregnancy creates "a high risk of major disability and death." *Management of High-Risk Pregnancy* 289-90 (J. Queenan ed. 2d ed. 1985).

For women with cancer, the second leading cause of death among women in their reproductive years, pregnancy poses especially serious and complex risks. Preg-

nancy may mask the cancerous condition, exacerbate the disease process, and increase the spread of tumors in the pregnant woman. E. Friedman, D. Acker & B. Sachs, *Obstetrical Decision Making* 62 (2d ed. 1987); see Williams & Bitran, *Cancer and Pregnancy*, 12 Clin. Perinat. 609 (1985). Moreover, because radiation treatment or chemotherapy is likely to cause severe fetal malformation or death, a pregnant woman with cancer who could benefit from such treatments will have to choose between protecting her health or that of her fetus.[3] Although the actual risks posed by pregnancy will vary depending on the individual and the nature of her complicating conditions, these examples illustrate how serious the risks may be.

Discussion between physician and patient of the full range of options, including the availability of abortion services, will be appropriate in other circumstances as well. Most typically, a patient may ask about the availability of abortion services when a pregnancy is unplanned and unwanted. Tragically, a significant number of clinic patients learn each year that they are pregnant as a result of rape. Pet. App. 90a (Drisgula ¶ 24); 91a (Potteiger ¶ 18). In these and other circumstances,[4] the medical specialty society of physicians whose practice is

[3] See S. Cherry, R. Berkowitz & N. Kase, *Rovinsky & Guttmacher's Medical, Surgical & Gynecological Complications of Pregnancy*, 512-15 (3d ed. 1985); *Obstetrical Decision Making* at 62.

[4] Options counseling is appropriate also when discussing the potential for the birth of a child with severe physical or mental abnormalities, which may result from a mother's pre-existing health condition, from the use of medications, from the mother's exposure to infection (notably AIDS or rubella), or from inherited genetic disorders. See generally *Abortion, Medicine, and the Law* at 253-55; *Obstetrical Decision Making* at 74-81. In such cases, the physician is ethically and legally obliged to inform the patient of the potential risks to the fetus, and promptly to provide or refer the patient for appropriate counseling to enable the patient to make informed decisions regarding the management or termination of her pregnancy. ACOG, *Ethical Issues in Pregnancy Counseling*, Committee on Ethics Opinion No. 61 (March 1988). See *supra* p. 5.

most directly involved in this case imposes a professional obligation on the physician to inform the patient of all options:

> In the event of an unwanted pregnancy, the physician should counsel the patient about her options: 1) continuing the pregnancy to term and keeping the infant, 2) continuing the pregnancy to term and offering the infant for legal adoption, or 3) aborting the pregnancy.

ACOG's *Standards for Obstetric-Gynecologic Services* 62 (7th ed. 1989). The physician must also refer the patient to an appropriate provider, particularly when delay in obtaining proper care may pose or exacerbate serious risks to the patient's health. *E.g.*, *Rise* v. *United States*, 630 F.2d 1068, 1073 (5th Cir. 1980); *Keir* v. *United States*, 853 F.2d 398, 413-14 (6th Cir. 1988).

But these are not solely matters of medical ethics, they are also governed by state law. Thus, a physician who has a pregnant patient with a serious, but not life-threatening health problem such as diabetes, must disclose to the patient the risks of pregnancy and the option of abortion or risk incurring liability or even professional discipline under state law for failure to comply with state law standards of care. See *infra* p. 16.

B. Impact of the New Regulations on Medical Practice

1. When it passed Title X in 1970, Congress declared its intent to "make comprehensive family planning services readily available to all persons desiring such services." 42 U.S.C. § 300. To that end, Congress authorized the Secretary of the then-Department of Health, Education, and Welfare "to make grants to . . . voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." 42 U.S.C. § 300(a).

In Section 1008, Congress prohibited the Secretary from awarding funds to any "programs where abortion

is a method of family planning." 42 U.S.C. § 300(a-6). From 1971 until 1988, the Secretary consistently interpreted § 1008 not to prohibit medically appropriate abortion-related counseling and referral. See Pet. App. 71a-73a (excerpting relevant program guidelines and legal memoranda); see also *Valley Planning Clinic* v. *North Dakota*, 661 F.2d 99 (8th Cir. 1981).

2. On February 2, 1988, the Secretary promulgated amendments to the regulations that preclude Title X projects from making any non-pejorative statements regarding abortion. 53 Fed. Reg. 2922 (1988); Pet. App. 1a-8a. Section 59.8 is entitled "Prohibition on counseling and referral for abortion services." This section prohibits abortion counseling (§ 59.8(a)(1)), referrals to abortion providers (§ 59.8(a)(2), (3)); and provision of lists that contain names or addresses of providers who principally perform abortions § 59.8(a)(3)). This section also requires the project to provide patients with "information necessary to protect the health of mother and unborn child" until such time as a referral appointment is kept with one of the approved providers of prenatal care. § 59.8(a)(2). The Final Rule makes clear the sweeping nature of the ban on abortion-related expression. See 53 Fed. Reg. at 2936, 2938.[5]

In addition, the Secretary enacted regulations to ensure that Title X projects would not be able to provide patients with information about abortion through project activities other than counselling or referral. Section 59.10 prohibits Title X projects from engaging in any communicative activities that would "encourage, promote or advocate abortion." Section 59.9 requires a Title X project to be "physically and financially separate . . . from activities which are prohibited under Section 1008 of the Act, and [under] § 59.8 and § 59.10 . . . ."

The new regulations preclude physicians from acting in accordance with their ethical and legal obligations. Pet. App. 79a (Morley ¶ 18); 81a-82a (Sammons ¶¶ 4, 16); see *infra* p. 16. Physicians are still required to provide comprehensive "general reproductive health care," including physical examinations and diagnostic testing. Thus, they are still required to provide the kind of care that triggers the ethical and legal obligations imposed by the physician-patient relationship. If, in the course of providing such care, however, the physician discovers that a woman is pregnant, or has a complicating condition such that pregnancy poses a serious health risk, or that the woman's pregnancy is even the result of rape, the physician is nevertheless precluded from informing the patient about all of her legally available medical options, from providing complete answers to her questions, or even from referring her to another source for obtaining the information she seeks.

To return to the example discussed previously, a physician in a Title X clinic confronted with a pregnant patient with diabetes will invariably face the choice of complying with the Secretary's regulations and thereby face state law tort or disciplinary consequences, or complying with state law and protecting the patient's health and in the process jeopardize the entire clinic and deprive hundreds of women of access to affordable health care. The question is whether Congress intended to impose this awful dilemma upon physicians when it enacted Title X.

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[5] The sweep of the ban is confirmed by 1) the Title of § 59.8; 2) the single narrow exception for "cases in which emergency care is required," § 59.8(a)(2); and 3) the regulations' illustrative examples. The Secretary has limited the emergency exception to referrals for immediately "life-threatening" situations, such as ectopic pregnancy; thus precluding referral and counseling that includes abortion in the many situations where pregnancy poses serious, but not life-threatening, health risks. See 53 Fed. Reg. at 2239; § 59.8(a)(4) (prohibiting even "medically necessary" counseling regarding abortion services); see also § 59.8(b)(5) (government-approved response to a patient's request for abortion counseling or referrals is: "the project does not consider abortion an appropriate method of family planning *and therefore* does not counsel or refer for abortion") (emphasis added).

SUMMARY OF ARGUMENT

I.

The court of appeals erred in addressing the Secretary's authority to issue the challenged regulations under the deferential standard of review established in *Chevron U.S.A.* v. *NRDC*, 467 U.S. 837 (1984). Where, as here, an agency's interpretation raises serious constitutional questions, this Court has repeatedly held that it will not defer to that interpretation if another reasonable interpretation is available that would avoid the need to resolve those questions. *DeBartolo Corp.* v. *Florida Gulf Coast Trades Council*, 485 U.S. 568, 574 (1988); *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 499-501, 504 (1979). Here, as in *Catholic Bishop*, there can be no dispute regarding the availability of an alternative interpretation for the Secretary himself employed just such an interpretation for the first 18 years following the passage of the Act. Here, too, the statutory language and legislative history are devoid of any clear evidence that Congress intended the Secretary to adopt his new, expansive interpretation. Accordingly, this Court should reject the Secretary's interpretation as outside the scope of his authority, and adopt a construction that does not raise constitutional concerns.

II.

The new regulations plainly violate the First Amendment proscription against viewpoint discrimination. Although government may choose to subsidize some activities but not others in order to further a partisan political agenda, *e.g.*, *Harris* v. *McRae*, 448 U.S. 297 (1980), government may not condition the subsidies on the recipients' agreement to espouse one viewpoint and not another. *Regan* v. *Taxation With Representation*, 461 U.S. 540, 548 (1983).

Although the court of appeals did not disagree with this principle, it plainly erred in concluding that the challenged regulations did not discriminate on the basis of

viewpoint. Section 59.10, for example, does not forbid recipients from engaging in categories of activities (such as lobbying or public speaking), but precludes them from *promoting abortion* through activities such as lobbying or public speaking. Other types of lobbying or public speaking, including anti-abortion expression, are not prohibited. Section 59.8 goes even further: it requires physicians to tell patients the government's view about what she should do in the event of pregnancy (*i.e.*, seek proper prenatal care from a provider that does not principally provide abortions). By specifying the views that fund recipients may and may not express on a single subject—medical treatment for pregnancy—the regulations impermissibly discriminate on the basis of viewpoint. Compare *Cornelius* v. *NAACP*, 473 U.S. 788, 806 (1985).

III.

Finally, the Secretary's regulations affirmatively interfere with and unduly burden a woman's right to make an informed medical decision concerning whether to terminate her pregnancy. Given the assumption of trust that underlies the physician-patient relationship, regulations ordering physicians to provide patients with selective information about the range of legal and medically appropriate treatment alternatives available to them are likely seriously to mislead many patients. This misinformation also will cause women to suffer increased health risks due to delay in obtaining a medically complete evaluation of their condition and options. No legitimate governmental interest is served by regulations that impose these "obstacles in the path of a woman's exercise of her freedom of choice." *Harris* v. *McRae*, 448 U.S. 297, 316 (1980).

ARGUMENT

I. THE CHALLENGED REGULATIONS EXCEED THE SCOPE OF THE SECRETARY'S AUTHORITY UNDER TITLE X.

In addressing the question of the Secretary's authority to issue the amended regulations, both the Second Circuit and the First Circuit erroneously analyzed the case under the deferential standard of review established in *Chevron U.S.A.* v. *NRDC*, 467 U.S. 837-842-45, & n.9 (1984). See Pet. App. 46a; Supp. Pet. App. 8sa. Under *Chevron*, the Secretary's interpretation "would normally be entitled to deference unless that construction were clearly contrary to the intent of Congress." *DeBartolo Corp.* v. *Florida Gulf Coast Trades Council*, 485 U.S. 568, 574 (1988).

"Another rule of statutory construction, however, is pertinent here: where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.* at 575 (citing *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 499-501, 504 (1979). In these circumstances, the burden is on the agency to demonstrate "the affirmative intention of the Congress clearly expressed" to require such an interpretation before the Court will reach the constitutionality of the agency's interpretation. *Id.* at 501, 504, 506; see *Public Citizen* v. *Department of Justice*, 109 S.Ct. 2558, 2579 (1989) (requiring "firm evidence" of congressional intent). Accordingly, this Court has repeatedly rejected an agency's construction of a statute when another constitutionally benign construction was fairly available. *E.g.*, *DeBartolo Corp.* 485 U.S. at 574-588; *Catholic Bishop*, 440 U.S. at 499-506; *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 156 (1946); *id.* at 160 (Frankfurter, J., concurring).

There can be no doubt that the Secretary's construction of Section 1008 raises serious constitutional questions.

The fact that one court of appeals, en banc, has voided the regulations on constitutional grounds is proof enough that the First and Fifth Amendment questions raised are substantial. Supp. Pet. App. 2sa-3sa. See *infra*, pp. 17-29.

Moreover, the Secretary's new regulations raise additional and serious concerns under the Supremacy Clause. As the Secretary has acknowledged, informed consent law in over 40 states requires that physicians disclose fully and accurately all information necessary for their patients to make voluntary and informed decisions about treatment options. 53 Fed. Reg. at 2929. And as discussed above, state law imposes a duty on physicians to refer patients to appropriate providers. See *supra* p. 6. Acknowledging that the new regulations may preclude physicians from complying with these state laws, the Secretary expressly stated an intent to preempt those laws: "[T]o the extent these regulations are inconsistent with the provisions of State law regarding counseling and informed consent, they may, in some circumstances, supersede State law under the Supremacy Clause of the Constitution." 53 Fed. Reg. at 2933.

These Supremacy Clause questions, no less than the other constitutional issues, are ones that should be avoided absent clear congressional intent to the contrary. The Court has long held that state law is presumed to coexist with federal regulation, and that preemption should not be inferred. *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978). This principle applies with particular force in areas of traditional state concern, such as health care and medical services. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *cf. Bowen* v. *American Hospital Ass'n*, 476 U.S. 610, 643-44 (1986) (plurality opinion). Accordingly, when an agency adopts a construction of a statute that may cause wide conflict with such state law, *Catholic Bishop* as well as basic preemption principles require the agency to provide affirmative and clear evidence that Congress intended to permit such an intrusion into state law.

While the Secretary seemed to assume that the potential for conflict between his interpretation of Title X and state law was not significant, his assessment of this point underestimates the breadth of a physician's exposure to liability for failure fully to inform a patient about treatment options. There are at least two common causes of action: First, any woman who suffers an adverse health effect because of her pregnancy who was not informed about an abortion or not properly referred to a physician who could provide her with that information will be able to sue the physician in the Title X clinic who failed directly or indirectly to bring the matter of an abortion to her attention. Second, any woman who gives birth to a severely impaired infant may sue for failure to disclose information that would have led her to choose an abortion. The former type of lawsuit is probably a viable claim as a form of medical malpractice in nearly all 50 states and the latter may be available in more than a dozen states. See, *e.g.*, D. Louisell & H. Williams, *Medical Malpractice* ¶¶ 22.03, 19.15 & n.10 (rev. ed. 1984 & Supp. 1990); *Phillips* v. *United States*, 566 F. Supp. 1, 8, 12-14 (D.S.C. 1981).

Here, there is no evidence that Congress intended the Secretary or the courts "to press ahead into [these] dangerous constitutional thickets . . . ." *Public Citizen*, 109 S.Ct. at 2572. Section 1008 prohibits the Secretary from disbursing federal funds only to family planning "programs where abortion is a *method* of family planning." 42 U.S.C. § 300a-6 (1982). The statute simply does not speak to the question whether the availability of abortions may be discussed as part of state law-required counseling or referral services.

There is no reason to reach the constitutional issues posed by the Secretary's new interpretation, because the Secretary's former interpretation of § 1008 is available and avoids completely all of the concerns raised by his new interpretation. Compare *Catholic Bishop*, 440 U.S. 490, 497 (NLRB's original interpretation did not raise constitutional questions). The Secretary's original interpretation is amply supported both by the plain language of the statute and the legislative history.[6] In promulgating the new regulations, the Secretary did not attempt to show that the new interpretation was compelled by the statute or legislative history. Nor could he. Because the challenged regulations raise serious constitutional questions, this Court should adopt the Secretary's original construction of Section 1008.

II. THE CHALLENGED REGULATIONS VIOLATE THE FIRST AMENDMENT RIGHTS OF FAMILY PLANNING PROVIDERS AND THEIR PATIENTS.[7]

The government's discretion in awarding benefits and privileges, though considerable, remains subject to First Amendment constraints. The government may decline to subsidize speech activities, but it may not administer its subsidies in a manner that discriminates on the basis of viewpoint and suppresses disfavored ideas. *Regan* v. *Taxation With Representation*, 461 U.S. 540, 549 (1983). The challenged regulations violate this principle.[8]

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[6] See, *e.g.*, Pet. App. 70a (S. Rep. No. 1004, 91st Cong., 2d Sess.) ("[A] successful family planning program must contain the following components: (1) Medical services, including consultation, examination, prescription and continuing supervision, supplies, instruction and referral to other medical services as needed"); H.R. Rep. No. 1161, 93d Cong., 2d Sess. 18 (1974) (physicians expected to disclose "any appropriate alternative methods or procedures that might be advantageous"); S. Rep. No. 29, 94th Cong., 1st Sess., *reprinted in* 1975 U.S. Code Cong. Admin. News 469, 524.

[7] In the view of *amicus* American Medical Association ("AMA"), it is not necessary to reach the constitutional issues addressed in parts II and III in order to resolve this case and it takes no position on those issues. Nevertheless, for the convenience of the Court, the AMA joined the previous sections rather than file separately. Sup. Ct. R. 37.1.

[8] *Amici* agree with the First Circuit (see Supp. Pet. App. 35sa, 39sa) that the challenged regulations are unconstitutional for a second, independent reason: they withhold a subsidy as a penalty for a potential grantee's independently funded speech, see *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972), and they do not provide a practical separation option. *FCC* v. *League of Women Voters*,

1. This Court has repeatedly upheld "[t]he general principle . . . that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (citing cases). Indeed, there regularly is unanimity on the need to enforce the First Amendment's prohibition against viewpoint discrimination.[9]

At the same time, this Court also has established the basic principle that the Constitution does not require Congress "to subsidize the exercise of a fundamental right." *Regan*, 461 U.S. at 549. Accordingly, the Court has held that Congress may decline to subsidize certain categories of activities, such as lobbying, (*id.*; *Cammarano* v. *United States*, 358 U.S. 498, 513 (1959)); certain types of medical procedures, such as abortions, (*Maher* v. *Roe*, 432 U.S. 464 (1977); welfare benefits, (*Lyng* v. *International Union*, 108 S.Ct. 1184 (1988));

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468 U.S. 364, 400-01 (1984). *Amici* note that in the context of physician-patient counseling any physical separation requirement is inherently burdensome on First Amendment rights. Physician-patient communication requires a full exchange of information between particular individuals at a particular time. Permitting the physician to speak freely on some other occasion in some other facility to some other patient does not preserve the First Amendment rights of either doctor or patient.

[9] See, *e.g.*, *FCC* v. *League Of Women Voters*, 468 U.S. 364, 383-84 (1984) (First Amendment prohibits laws motivated by "'a desire to curtail expression of a particular point of view on controversial issues of general interest'") (quotation omitted); *id.* at 407-08 (Rehnquist, J., joined by Burger, C.J., and White, J., dissenting) (agreeing with principle); *id.* at 414 & n.6 (Stevens, J., dissenting) (same); *Arkansas Writer's Project* v. *Ragland*, 481 U.S. 221, 234 (1987) (viewpoint discrimination impermissible); *id.* at 237 (Scalia, J., joined by Rehnquist, C.J., dissenting) (suggesting possibly "more stringent, prophylactic rule is appropriate, and can consistently be applied, when the subsidy pertains to the expression of a particular viewpoint on a matter of political concern . . ."); *Board of Educ.* v. *Pico*, 457 U.S. 853 (1982) (officials may not remove books from public school library because they disagree with the views expressed therein).

or a campaign for public office. *Buckley* v. *Valeo*, 424 U.S. 1, 90-108 (1976).

In no case involving Congress's power to choose which activities it wishes to subsidize, however, has this Court ever carved out any exception to the First Amendment's bedrock prohibition against viewpoint discrimination. In fact, the Court has taken pains to clarify that the government may not use its vast spending and taxing powers to reward or penalize fund recipients based on the views they wish to express. For example, in *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983), on which the courts below chiefly (and mistakenly) relied (Pet. App. 56a, 29a-30a), the Court upheld the denial of tax subsidies to non-profit organizations engaged in lobbying on the explicit understanding that the regulation at issue did not discriminate on the basis of the organization's viewpoint:

> The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'aim at the suppression of dangerous ideas.' . . . We find no indication that the statute was intended to suppress any ideas or any demonstration that it has that effect.

461 U.S. at 548 (quoting *Cammarano* v. *United States*, 358 U.S. 498, 513 (1959)). Similarly, in *Lyng* v. *International Union*, 108 S.Ct. 1184 (1988), which was relied on by the district court below (Pet. App. 29a) and involved Congress's decision not to provide striking workers with food stamps, the Court found no evidence of viewpoint discrimination and observed that Congress's intent was to "maintai[n] neutrality in private labor disputes." *Lyng*, 108 S.Ct. at 1193.

Even in those subsidy cases in which the Court has not expressly addressed the question of viewpoint discrimination, it is plain from the facts that no such issue was presented.[10] For example, in *Buckley* v. *Valeo*,

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[10] *Maher* v. *Roe*, 432 U.S. 464 (1977), and *Harris* v. *McRae*, 448 U.S. 297 (1980), involved legislative decisions not to fund the *performance* of abortions. Similarly, *Republican Nat'l Comm.* v.

424 U.S. 1, 90-93, 105-08 (1976), the Court upheld a campaign finance law that provided public funds only to those candidates who participated in party primaries. Such a restriction is plainly viewpoint-neutral. It is inconceivable that the Court would have upheld a campaign finance statute in which Congress conditioned the receipt of public campaign funds on the candidate's agreement not to use them to advocate reform of the campaign-finance laws. *Cf. id.* at 97 n.131. Similarly, while the Court reaffirmed in *Regan* Congress's right to choose not to subsidize lobbying activities generally, the Court surely would have invalidated a congressional statute that denied tax subsidies to groups who lobbied for a particular cause, such as greater environmental protection, but granted subsidies to groups that lobbied against that cause. See *Regan*, 461 U.S. at 548.

This Court's decisions therefore establish that (1) government has the right, through granting subsidies to particular types of activities but not others, to promote a partisan political agenda, but that (2) government is forbidden to promote such an agenda by conditioning the award of subsidies on the recipient's willingness to engage in or forgo the expression of particular views. The question presented here, accordingly, is whether the Secretary's regulations cross this constitutional line.

2. Other than the majority below, every court to consider the challenged regulations has found them to be viewpoint discriminatory.[11] As the Secretary concedes,

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Federal Election Comm'n, 487 F. Supp. 280 (S.D.N.Y.), *certified questions answered*, 616 F.2d 1 (2d Cir.), *aff'd*, 445 U.S. 955 (1980), relied on by the majority below (Pet. App. 56a), involved a decision not to subsidize the campaigns of candidates who received any private funding. Each of these cases involved a content-neutral decision by the government not to subsidize a particular activity.

[11] Supp. Pet. App. 41sa; *id.* at 30a-31a; *Planned Parenthood* v *Bowen*, 680 F. Supp. 1465, 1477 (1988) (regulations accord "preferential treatment to speech favoring childbirth"); *West Virginia Ass'n of Community Health Centers, Inc.* v. *Sullivan*, No. 2:89-0330, LEXIS 6180 (S.D. W. Va. 1990); see also Pet. App. 63a-64a (Kearse, J., dissenting).

the speech restrictions in question exhibit "a bias in favor of childbirth and against abortion." 53 Fed. Reg. at 2943. Section 59.10, for instance, does not forbid Title X grantees from engaging in political and lobbying activities generally, but only from engaging in those political and lobbying activities that advance a pro-abortion viewpoint. Section 59.8 goes even further: it compels speech that promotes the government's anti-abortion ideology as well as prohibits speech to the contrary.

The majority's "finding" below (Pet. App. 59a) that the new regulations do not discriminate on the basis of viewpoint is flatly inconsistent with the plain language of the regulations themselves. For example, the majority states that the regulations do not "in any way suggest that Title X funds may be used for public anti-abortion advocacy." But nothing expressly forbids it, while Section 59.10, by its terms, prohibits only speech that promotes abortion. The name of the provision alone reveals its viewpoint bias: § 59.10 is not a viewpoint neutral prohibition on public activity regarding abortion, but a self-proclaimed "[p]rohibition on activities that *encourage, promote or advocate abortion*" (emphasis added). Thus, Title X prohibits grantees: not simply from lobbying, but from "lobbying for . . . legislation to increase in any way the availability of abortion as a method of family planning," § 59.10(a)(1); not simply from providing speakers, but from "providing speakers to promote the use of abortion as a method of family planning," § 59.10(a)(2); and not simply from distributing materials, but from "disseminating in any way materials . . . advocating abortion as a method of family planning." § 59.10(a)(5). At the same time, Section 59.10 is silent on the use of funds for lobbying *against* the passage of pro-abortion legislation, providing speakers to *discourage* the use of abortion, and distributing materials *opposing* abortion.

Section 59.8 is also viewpoint discriminatory on its face. Rather than generally forbidding "argumentation pro or

con as to the advisability of an abortion," as the majority below erroneously suggests (Pet. App. 59a), the regulation selectively suppresses medical information about abortion while compelling speech that promotes its alternatives. Under § 59.8(a)(1), a Title X physician treating a pregnant patient may not provide her with nondirective, informational counseling about abortion. Nor may the doctor refer the patient to another health care facility that will provide abortion information and services. In fact, all referrals to prenatal, social service or emergency care facilities must exclude facilities that principally provide abortions. § 59.8(3). Without regard to the needs of the particular patient, the physician-patient dialogue is censored to eliminate any nonpejorative reference to abortion.

At the same time, §§59.8(a)(2) and (3) compel speech in furtherance of an anti-abortion viewpoint. Section 59(a)(2) compels physicians to refer all pregnant patients, whatever their medical circumstances, to prenatal care providers that "promote the welfare of mother and unborn child," and to give their patients all "information necessary to protect the health of mother and unborn child." Section 59.8(a)(3) requires physicians to provide referral lists (the same lists that may not include any regular abortion providers) that must include all "available providers who do not provide abortions" whether or not the physician judges them suitable for a particular patient.

Finally, contrary to the majority's assertion, § 59.8 does not require physicians to respond to requests for information on abortion merely with "the factual statement that the particular program does not include it as a family planning method . . ." Pet. App. 59a. Instead, § 59.8 requires Title X physicians to tell their patients that "the project does not consider abortion an *appropriate* method of family planning." § 59.8(b)(5), a statement which clearly expresses a normative judgment against abortion. Section 59.8 thus operates to compel

physicians to transmit a message of official disapproval of abortion while suppressing contrary information and views.

3. Even in cases involving "nonpublic forums," where government has wide latitude to determine the identity of the speakers and the content of the expression, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius* v. *NAACP*, 473 U.S. 788, 806 (1985); see *Perry Educ. Ass'n* v. *Perry Local Educator's Ass'n*, 460 U.S. 37, 46, 49 (1983). By requiring Title X physicians to engage in speech regarding pregnancy while forbidding them to speak about a legally available medical alternative to continuing a pregnancy to term, the Secretary's regulations "suppress the point of view [a physician] espouses on an otherwise includable subject." Government should not be permitted to use federal funds to engage in viewpoint discrimination in administering subsidies any more than in controlling its federally funded nonpublic forums.

The "need for absolute neutrality by the government" (*Young* v. *American Mini Theatres Inc.*, 427 U.S. 50, 67 (1976)) with respect to the expression of views is acute in any setting because of the government's unmatched ability to control public debate. As the Court explained in *City of Madison, Joint School Dist.* v. *Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175-76 (1976), "[t]o permit one side of a debatable public question to have a monoply in expressing its views . . . is the antithesis of constitutional guarantees."

To be sure, the government has not attempted to impose its regulations on every provider of family planning services. But as the Court has repeatedly stated, there is "'no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means.'" *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. at 231 (quoting *Virginia Bd. of Pharmacy* v. *Virginia Consumer Council*, 425 U.S.

748, 757 n.15 (1976). Moreover, the Court has repeatedly recognized that the practical availability of alternative channels of information bears on the reasonableness of even a content-neutral regulation of speech. *Perry Educ. Ass'n*, 460 U.S. at 53-4; *Cornelius*, 474 U.S. at 809. For the clients of Title X projects—women living at or near the poverty line and without access to alternative sources of medical information—the government's regulations may as well be universally applicable. Virtually by definition, the Secretary's regulations apply to clinics that serve women who do not have means available to "shop widely in the marketplace of ideas," consulting with a variety of public and private providers, in order to obtain complete information. Their Title X physician, and the referrals he or she provides, *are* their sole source of information. Through these regulations, the Secretary has ensured that for many women the only voice they will hear when attempting to decide whether to carry a pregnancy to term is government approved.

In sum, there is no question that government may make a value judgment favoring a particular public policy and may choose to promote that policy through its spending power. But the legitimacy of the government's ultimate goal does not empower the government to use means that are inconsistent with the First Amendment. The Secretary's regulations cross the line from a mere refusal to subsidize particular activities to an affirmative use of subsidies to promote one viewpoint and silence another. The regulations therefore are unconstitutional.

III. THE CHALLENGED REGULATIONS UNCONSTITUTIONALLY BURDEN THE FUNDAMENTAL RIGHT OF PATIENTS IN TITLE X PROGRAMS TO CHOOSE TO TERMINATE THEIR PREGNANCIES.

This Court has long recognized that the individual has a fundamental right, derived from the guarantee of liberty in the Due Process Clauses of the Fifth and Fourteenth Amendments, to have "independence in making certain kinds of important decisions." *Whalen* v. *Roe*, 429 U.S. 589, 599-600 (1977). At the core of this right

are decisions concerning procreation and marriage; "unwarranted government interference with freedom of choice" in making such inherently personal decisions is antithetical to basic concepts of individual liberty in the free society protected by our Constitution. *Harris* v. *McRae*, 448 U.S. 297, 317 (1980); see *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 685, 687 (1977); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

The personal decisions protected by the Due Process Clause include both the right to terminate a pregnancy, *Roe* v. *Wade*, 410 U.S. 113 (1973), and more broadly, the right to be free of undue governmental interference in making important medical decisions. Just last Term, in *Cruzan* v. *Director*, No. 88-1503, slip op. at 13-15 (June 25, 1990), this Court reviewed the long common-law tradition upholding an individual's right to make informed decisions about medical treatment, and held that the Due Process Clause protects the right of individuals to "refus[e] unwanted medical treatment." *Id.* A logical corollary of the right to refuse treatment is the right not to be manipulated, deceived, or mislead into consenting to a course of treatment one might otherwise have refused.

In this case, the government defends against and the court of appeals rejected the due-process challenge to the regulations solely on the ground that government is not obligated to subsidize the exercise of constitutional rights. See *Maher* v. *Roe*, 432 U.S. 464, 474-76 (1977); *Harris* v. *McRae*, 448 U.S. 297, 316-18 (1980); 53 Fed. Reg. at 2935-36; Pet. App. 53a-59a. But *Maher* and *Harris* do not allow government to provide women with selective and potentially misleading information about their medical options and reproductive choices. Where, as here, such information will inevitably mislead women, the government has placed just the sort of "obstacl[e] in the path of a woman's exercise of her freedom of choice" that *Harris* and *Maher* prohibit. *Harris*, 448 U.S. at 316; see *Maher*, 432 U.S. at 473-74 (state may not impose "unduly burdensome interference with [woman's] freedom to

decide whether to terminate her pregnancy"); *cf. Webster* v. *Reproductive Health Servs.*, 109 S.Ct. 3040, 3060 (1989) (O'Connor, J., concurring) (state restriction that would "prohibit publicly employed health professionals from giving specific medical advice to pregnant women" would raise constitutional concerns).

By providing women with selective information, the regulations affirmatively interfere with and unduly burden a woman's exercise of her rights to choose whether to bear a child and to choose her course of medical treatment. As this Court and the common law have long recognized in a variety of contexts, the provision of selective information in a context where full disclosure may reasonably be expected is worse than providing no information at all. Accordingly, those in fiduciary relationships have a common law duty to disclose all material facts.[12] The state law of informed consent places a comparable duty on physicians, see *supra*, pp. 4-5. The doctor-patient relationship is founded on trust. A patient expects her physician to provide her with all of the information reasonably relevant to her decision. The court of appeals simply erred in failing to recognize how Title X patients, acting on this expectation, may be seriously mislead if given selective information.

First, the Secretary's regulations will mislead some women, particularly adolescents, into thinking that the medical system does not provide abortions. Contrary to the Secretary's assumption (53 Fed. Reg. at 2933), many women do not know whether abortion is a legal, practical, or safe medical alternative for them. See Pet. App. 87a, 91a, 92a, 95a (White ¶ 13; Potteiger ¶ 17; Rust ¶ 15; Merrens ¶ 15). For most of these women, the Title X clinic is their only source of health care information. *Id.* at 78a, 85a, 86a, 87a (Joseph ¶ 5; Fink ¶ 10; Coombs

[12] *Chiarella* v. *United States*, 445 U.S. 222, 227-28 (1980); see *Nader* v. *Allegheny Airlines*, 426 U.S. 290 (1976) (businesses must disclose material facts to consumers); *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231-32 (1988) (issuers of securities must disclose all material facts to investors).

¶ 11; Morgan ¶ 6; White ¶ 15). To deny these women even basic information regarding the availability of abortion services is to tell them that such services do not exist. Rather than seek out other information sources, many of these women are likely to seek out unlicensed abortion providers or attempt dangerous self-abortions, thereby exposing themselves to potentially irreparable mental and physical harm. Pet. App. 92a (Rust ¶ 11).

Second, the Secretary's regulations will affirmatively mislead some women with complicating conditions to believe that continuation of a pregnancy is a medically safe and recommended option when in fact their health risks are serious. *See supra* pp. 7-9; Pet. App. 76a (Sammons ¶ 16). Physicians must counsel such women about "good health practices" (53 Fed. Reg. at 2937) and refer them to a prenatal care provider. Such counseling may leave a woman with the impression that her pregnancy poses no serious risks to her health—if not, why would her physician say nothing about an abortion? Like many women, she may delay going—or may never go—for prenatal counseling; even if her Title X physician is aware of a problem and concerned about delay, the physician may not advise her that pregnancy termination is an available option to consider.

Third, even women who are aware that abortion is a legal and safe alternative and who are interested in obtaining an abortion may be significantly burdened by the Title X physician's incomplete disclosure. By providing the patient with a list that includes some facilities—typically hospitals—that perform abortions, the regulations may lead a woman to believe that the list of facilities is comprehensive, and that her only source for an abortion is a hospital. For many low-income women, however, "[a]bortions performed in hospitals are generally prohibitively expensive." Pet. App. 82a (Henshaw ¶ 3); see Henshaw, *Freestanding Abortion Clinics: Services, Structure, Fees*, 14 Fam. Plann. Persp. 248, 249 (1982). Moreover, in many areas, the *only* provider of abortion services will be a clinic that primarily provides abortions, but those clinics are ex-

cluded from the Secretary's list of providers. See Henshaw, Forrest & Van Vort, *Abortion Services in the United States, 1984 and 1985*, 19 Fam. Plann. Persp. 63 65 (1987). Thus, at a minimum, the new regulations will significantly delay many women from obtaining an abortion, thereby substantially increasing their health risks.[13]

These harms—misleading women about the availability of abortions and the relative safety of carrying a pregnancy to term, and imposing upon women the health risks that accompany delay in obtaining full information—are substantially greater than those imposed by laws previously invalidated by this Court.[14] These regulations thus constitute the kind of "unwarranted government interference with freedom of choice" (*Harris* v. *McRae*, 448 U.S. at 317) that subject the government's actions to heightened judicial scrutiny.

Here, the government's sole justification is its interest in ensuring that the statutory "bias in favor of childbirth" and against abortion is fairly implemented by family planning clinics. The Secretary's enforcement concerns cannot possibly justify a regime in which women, in violation of state requirements, are denied candid conversations with their physicians and are

[13] See W. Hern, *Abortion Practice* 43 (1984); Cates, Schultz, Grimes & Tyler, *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Fam. Plann. Persp. 266, 267 (1977); *Hodgson* v. *Minnesota*, No. 88-1125, slip op. 21 (June 25, 1990). The Secretary's attempt to justify the burdens of delay by reference to the ACOG recommendation that "a woman 'should be allowed sufficient time for reflection prior to making an informed decision'" (53 Fed. Reg. at 2938 (quoting ACOG Standards [6th ed.] at 63) reveals just how profoundly the Secretary misunderstands the informed consent process—it is only *after* the patient is aware of her options that any meaningful reflection can occur.

[14] See *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 443 (1983) (invalidating requirement that physicians recite a litany of abortion "facts"); *Thornburgh* v. *ACOG*, 476 U.S. 747, 762 (1986) (state-mandated provision of information "is the antithesis of informed consent").

forced instead to hear selective and misleading assessments of their treatment options. Forcing physicians to provide patients with incomplete medical information and thereby to violate the basic trust underlying the physician-patient relationship can never be a permissible means to any legitimate governmental interest.

* * * *

The Secretary's Title X regulations have gone well beyond what Congress has required and have created the kind of untoward legal consequences that warrant judicial condemnation. The regulations without justification directly intrude into and interfere with physician-patient relationships that historically have been governed exclusively by state law and place physicians in the dilemma of complying with state *or* federal law, but not both; the regulations discriminate on the basis of the speaker's viewpoint in a way that has been unfailingly rejected by this Court; and the regulations have created a significant obstacle to a woman's ability to exercise rights protected by the Constitution and state law. In sum, the regulations directly undermine the very purpose for which Title X was enacted: they impair rather than enhance the health of individuals who turn to those clinics for assistance. Because Congress never intended these results and the Constitution would not countenance them even if Congress had so intended, the regulations should be set aside.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

CARTER G. PHILLIPS *
MARK E. HADDAD
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

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* Counsel of Record

Of Counsel:

ANN E. ALLEN
AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS
409 12th Street, S.W.
Washington, D.C. 20024
(202) 638-5577

JACK R. BIERIG
DAVID F. GRAHAM
LYNN D. FLEISHER
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

R. MICHAEL MILLER
ELIZABETH GALLUP
AMERICAN ACADEMY OF FAMILY PHYSICIANS
8880 Ward Parkway
Kansas City, Missouri 64114-2797
(800) 274-2237

KIRK B. JOHNSON
EDWARD B. HIRSHFELD
DAVID ORENTLICHER
AMERICAN MEDICAL ASSOCIATION
535 North Dearborn Street
Chicago, Illinois 60610
(312) 645-4600

LAURIE R. ROCKETT
HOLLYER, JONES, BRADY, SMITH, TROXELL, BARRETT & CHIRA
342 Madison Avenue
New York, N.Y. 10173
(212) 818-1110
(Counsel to the American Medical Women's Association)

JOEL I. KLEIN
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184
(Counsel to the American Psychiatric Association)

JACQUELINE C. LEIFER
FELDESMAN, TUCKER, LEIFER, FIDEL & BANK
2001 L Street, N.W.
Washington, D.C. 20036
(202) 466-8960
(Counsel to Physicians for Reproductive Health)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DR. IRVING RUST, on behalf of himself, his patients, and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

THE STATE OF NEW YORK, THE CITY OF NEW YORK, THE NEW YORK CITY HEALTH & HOSPITALS CORP.,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* THE AMERICAN PUBLIC HEALTH ASSOCIATION, THE AMERICAN COLLEGE OF PHYSICIANS, *ET AL.*, IN SUPPORT OF PETITIONERS

(*Amici continued on inside cover*)

Of Counsel:

NADINE TAUB
Rutgers University School of Law
15 Washington Street
Newark, New Jersey 07102

LARRY M. LAVINSKY
Counsel of Record
CHARLES S. SIMS
MICHELE M. OVESEY
ADAM JAY SHULMAN
Proskauer Rose Goetz & Mendelsohn
300 Park Avenue
New York, New York 10022
(212) 836-1294

Attorneys for Amici Curiae

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THE ASSOCIATION OF MATERNAL AND CHILD HEALTH PROGRAMS
THE NATIONAL ASSOCIATION OF PUBLIC HOSPITALS
THE ASSOCIATION OF SCHOOLS FOR PUBLIC HEALTH
THE ASSOCIATION OF STATE AND TERRITORIAL HEALTH OFFICERS
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THE AMERICAN COLLEGE OF NURSE-MIDWIVES
THE CALIFORNIA COALITION OF NURSE PRACTITIONERS
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THE ALAN GUTTMACHER INSTITUTE
THE CENTER FOR POPULATION OPTIONS
THE NATIONAL ABORTION FEDERATION
FAMILY PLANNING ADVOCATES OF NEW YORK STATE, INC.
THE AMERICAN MEDICAL STUDENT ASSOCIATION
THE COMMITTEE OF INTERNS AND RESIDENTS
ATTENDING PHYSICIANS OF THE MONTEFIORE FAMILY HEALTH CENTER
ALLAN ROSENFIELD, M.D., DEAN OF THE COLUMBIA UNIVERSITY SCHOOL OF PUBLIC HEALTH

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INTEREST OF *AMICI CURIAE*

Amicus the American Public Health Association ("APHA") is a national organization devoted to the promotion and protection of personal and environmental health and to disease prevention. Founded in 1872, APHA is the largest public health organization in the world with over 50,000 members. It represents all disciplines and specialties in public health, including patients and health professionals such as physicians, nurses, health educators and family planning specialists.

The other *amici* on whose behalf this brief is submitted[1] include associations of health care professionals, all of whom are dedicated to the advancement of public health in the United States, experienced in the study of public health problems and committed to finding solutions to pressing public health concerns. Their membership consists of thousands of women and men throughout the country, many of whom are engaged in the delivery of reproductive health care and work in Title X-funded facilities. Other *amici*, including the United States Conference of Mayors, are committed to the implementation of sound public health policy.

At issue in this case are new Title X regulations which, if upheld, will have devastating consequences for public health care and for poor women. In a number of ways discussed below, they are a blueprint for substandard medical care and a threat to the health and lives of those Title X was intended to serve. Because the regulations run counter to fundamental public health principles in which *amici* firmly believe and which they strive to promote, *amici* urge this Court to strike them down.

While *amici* believe that the regulations violate the constitutional rights of women and health care providers, they confine themselves in this brief to demonstrating that the reg-

1 *Amici* have the consent of the parties to file this brief and letters of consent have been filed separately in this Court.

ulations contravene the congressional purpose of providing medical care for poor women and safeguarding their reproductive health.

SUMMARY OF ARGUMENT

Almost two decades ago, Congress enacted Title X of the Public Health Service Act, 42 U.S.C. § 300 *et seq.* (1982 & Supp. 1990) ("Title X" or the "Act") — a milestone in the advancement of public health in this country. As Congress intended, Title X has brought family planning services to millions of low-income women who, prior to passage of the Act, lacked access to a family planning program of any kind. As Congress envisioned, Title X has fostered the creation of programs offering a broad range of family planning services as well as general medical care ancillary to those services. These programs also serve as valuable sources of referral to other health care providers. Thus, Title X has established a vital point of entry for poor women into the general health care system and has brought continuity of care to a system marred by fragmentation.

Title X provides that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." § 1008, 42 U.S.C. § 300a-6. Notwithstanding the national debate over abortion, the government has, until now, interpreted this provision to permit, and since 1981 to require, that Title X programs provide nondirective abortion counseling and referrals. Only funding for abortion procedures was considered barred.[2]

2 *See* Special Subcommittee on Human Resources, Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess., *Report of the Secretary of Health, Education and Welfare Submitting Five-Year Plan for Family Planning Services and Population Research Program* 318 (Comm. Print 1971); *see also* 36 Fed. Reg. 18,465 (1971), *revised by* 45 Fed. Reg. 37,437 (1980) (codified at 42 C.F.R. § 59.5(b)(2) (1986)); United States Department of Health and Human Services, *Program Guidelines for Project Grants for Family Planning Services* § 8.6 (1981) (Title X grantees must provide pregnant clients with nondirective counseling on and referral upon request for "[p]renatal care and delivery[;] [i]nfant care, foster care, or adoption[; and] [p]regnancy termination.")

On February 2, 1988, in a sharp break with this long-standing interpretation, the Secretary of the United States Department of Health and Human Services (the "Secretary" or "HHS") promulgated new regulations under the Act which ban all abortion counseling, even if conducted in a nondirective manner, and all referral for abortion. § 59.8(a)(1).[3] The pregnant woman with a serious or potentially life-threatening disease can no longer be told that her pregnancy poses substantial health risks that may require an abortion to protect her health. The pregnant woman at high risk of delivering a child with a severe or fatal birth defect can no longer make an informed choice whether to carry her pregnancy to term. Instead, once the Title X patient is diagnosed as pregnant, she "must" be referred for prenatal care "by furnishing a list of available providers that promote the welfare of mother and unborn child." § 59.8(a)(2).

The regulations' prohibition of all abortion counseling and referral is relentless in scope. If a pregnant woman asks her doctor for information about abortion or where she can get an abortion, her questions must not be answered. Even if a pregnant woman with a fatal disease, such as AIDS, asks whether an abortion will prolong her life, no responsive answer will be forthcoming. Instead, the regulations direct the Title X physician to advise that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." § 59.8(a)(5).

If the pregnant woman seeks an abortion on her own, her ability to find an appropriate provider is severely restricted. The regulations require that the referral list exclude providers

3 *See* 53 Fed. Reg. 2944-46 (1988) (codified at 42 C.F.R. §§ 59.2, 59.5, 59.7, 59.8, 59.9 and 59.10). Hereinafter, reference to these regulations will be by section number ("§ _____").

whose "principal business is the provision of abortions." § 59.8(a)(3). This limitation effectively excludes virtually all abortion providers the Title X patient has access to or can afford. It will also cause hazardous delay in obtaining an abortion.

The only exception to mandatory referral for prenatal care is when "emergency care" is required. § 59.8(a)(2). Although "emergency" is not defined, the regulations' one example (ectopic pregnancy) makes clear that only health conditions which are imminently life-threatening will justify a referral for abortion. § 59.8(b)(2). For the many pregnant women who are not at immediate risk, but who suffer from a condition which may be worsened or rendered life-threatening if pregnancy is carried to term, such as severe diabetes, cancer or heart disease, this exception is of no help.

The regulations further demand that Title X-funded clinics be both physically and financially separate from programs engaging in "prohibited" activities. § 59.9. This onerous requirement, which runs counter to all notions of continuity of care, will cause many Title X programs to curtail their services or close altogether.

While Congress hardly intended to harm the beneficiaries of the health care program it created, the regulations at issue do precisely that. They deprive poor women of information necessary to make vital health care decisions. In mandating only one kind of referral, they disregard the individual's medical needs, and steer women on a course which risks jeopardizing their health, and at times, their lives.

The damage caused to the physician-patient relationship is equally destructive. To ensure that adequate care is afforded the patient, the dialogue between doctor and patient must be open and honest. The script the regulations require the Title X physician to follow is anything but honest. It forces the health care professional to obfuscate answers to life and death questions. Attempts to place words in the mouth of the physician have been rejected by this Court. *See Thornburgh v. American College of Obstetricians & Gynecologists*, 476

U.S. 747 (1986); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983). Any deviation from this precedent will result in the provision of substandard health care to those women most in need — the very antithesis of what Title X was designed to achieve.

Despite the national tensions over abortion, the Title X program has functioned effectively for the past twenty years. By prohibiting funding for abortion while permitting nondirective option-counseling, Congress achieved a careful balance which ensured delivery of services in conformity with professional standards of care and integration of family planning services into general health care programs. The regulations seek to destroy that balance and, if upheld, will reverse two decades of progress in public health care for poor women.

ARGUMENT

I. THE REGULATIONS SUBVERT THE PURPOSES FOR WHICH TITLE X WAS ENACTED AND CONTRAVENE SOUND PUBLIC HEALTH POLICY BY ENDANGERING THE HEALTH OF THE VERY WOMEN THEY PURPORT TO SERVE

When Title X was enacted in 1970, it was estimated that 5 million indigent women in the United States were in need of family planning services and more than 60% of the nation's counties lacked an identifiable family planning program of any kind.[4] To remedy this "extreme" health care shortage,[5] Congress enacted Title X which requires that "priority . . . be given . . . to the furnishing of [family planning] services to persons from low-income families . . . ." 42 U.S.C. § 300a-4(c)(1).

Title X is now the single largest source of federal funding for family planning services, funding 3900 clinics and serving

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4 *See* S. Rep. No. 1004, 91st Cong., 2d Sess. 9 (1970).

5 *Id.*

nearly 4.5 million people each year. *See* Morley ¶ 6 (224 JA).[6] In 1986, in New York State alone, Title X-funded agencies served nearly 240,000 women, at least 70,000 of whom were adolescents. *See* Gesche ¶¶ 6-7 (171 JA); Fink ¶¶ 3, 7 (160-61 JA). Title X programs provide family planning services to the most vulnerable women in our society. Approximately 90% of these women have incomes below 150% of the poverty line and over 30% are teenagers. *See Massachusetts v. Secretary of Health & Human Servs.*, 899 F.2d 53, 56 (1st Cir. 1990) (*en banc*), *petition for cert. filed*, 58 U.S.L.W. 3819 (U.S. Jun[illegible], 1990) (No. 89-1929); Gesche ¶ 7 (171 JA). For many of them, the Title X-funded clinic is their only source of health care — they do not have and cannot afford private doctors. *See* Drisgula ¶¶ 18-19 (153-54 JA); Tiezzi ¶ 8(a) (272-73 JA); Merrens ¶ 5 (284 JA).

Congress further intended that Title X programs serve as a point of entry into the general health care system for millions of low-income women. This was to be accomplished in two ways. First, in requiring that Title X programs "offer a broad range of acceptable and effective family planning methods and services" (42 U.S.C. § 300(a)), Congress intended that such programs provide "much more than the dispensation of contraceptive devices."[7] Second, Congress intended that family planning services be integrated into — not separated from — general health care programs.[8]

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6 Citation to the materials in the parties' Joint Appendix filed in this Court are accompanied by a reference to the page number as ("_____ JA"). Citation to the materials in the parties' Joint Appendix filed in the Second Circuit are accompanied by a reference to the page number as ("_____ A"). All references to affidavits and declarations in the record will be to the last name, paragraph number and appendix page.

7 S. Rep. No. 1004, 91st Cong., 2d Sess. 10 (1970).

8 *See* H.R. Rep. No. 1472, 91st Cong., 2d Sess. 7, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5068, 5074; H.R. Conf. Rep. No. 1524, 93d Cong., 2d Sess. 58 (1974); S. Rep. No. 29, 94th Cong., 1st Sess. 66, *reprinted in* 1975 U.S. Code Cong. & Admin. News 469, 528; *see also Massachusetts v. Secretary of Health & Human Servs.*, 899 F.2d at 59.

Thus, HHS' first Five Year Plan for the Title X program, submitted to Congress pursuant to 42 U.S.C. § 300a-6a, stated:

> In addition to specific contraceptive services, programs should make available other related medical examinations and tests to assist in the early detection of illness and disease. While the program cannot provide full medical care because of its specialized nature, services should be provided for the screening and referral, including followup, of the patient to appropriate physicians, hospitals or other programs for necessary treatment. *This mechanism is vital, given the fact that family planning is often the point of entry into a fragmented health care system for many individuals.*[9]

In 1975, when Congress reauthorized Title X, the Senate Committee Report accompanying reauthorization cited with approval the broad scope of medical and social services provided by Title X programs,[10] and emphasized that, whenever possible, these services should be "integrat[ed] into all programs offering general health care."[11]

The congressional mandate to assess the general health of the patient enabled the Title X provider to uncover illness and disease and, if the patient was pregnant, to counsel her about the impact of pregnancy on her health. The congressional mandate to integrate Title X services into general health

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9 Special Subcommittee on Human Resources, Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess., *Report of the Secretary of Health, Education and Welfare Submitting Five-Year Plan for Family Planning Services and Population Research Program* 318 (Comm. Print 1971) (emphasis added) (41 JA).

10 These medical services include "general medical examinations, pelvic and breast examinations, pap smears and other diagnostic laboratory tests, as well as the provision of infertility services and contraceptives." S. Rep. No. 29, 94th Cong., 1st Sess. 55, *reprinted in* 1975 U.S. Code Cong. & Admin. News 469, 517.

11 S. Rep. No. 29, 94th Cong., 1st Sess. 66, *reprinted in* 1975 U.S. Code Cong. & Admin. News 469, 528.

care programs facilitated, if not ensured, appropriate referral of the patient to other providers for specialized treatment. Over the past two decades, Title X providers have achieved considerable success in complying with these two mandates.

Congress also contemplated that Title X programs would deliver services in accordance with legal and ethical standards of care,[12] as embodied in informed consent statutes throughout the nation, judicially developed common law and canons of medical ethics. Title X providers have always adhered to these standards and, until promulgation of these regulations, nothing has prevented them from doing so.

As demonstrated below, the regulations do not comport with the purposes underlying Title X — they betray them. They exceed the Secretary's rule-making power and must be struck down. *See United States v. Larionoff*, 431 U.S. 864, 873 n.12 (1977).

A. The Regulations' Ban On Abortion Counseling And Referral Seriously Jeopardizes The Health Of Women Served By Title X Programs

Disregarding the careful balance struck by Congress in prohibiting funding of abortion while permitting abortion counseling, the regulations radically alter what information a Title X provider may give to its patients. Section 59.8(a)(1) provides:

> A Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.

The effect of this prohibition is to block women's access to information necessary to protect their health and, at times, their lives.

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12 *See* H.R. Rep. No. 1161, 93d Cong., 2d Sess. 18-19 (1974); H.R. Conf. Rep. No. 1524, 93d Cong., 2d Sess. 57 (1974); S. Rep. No. 29, 94th Cong., 1st Sess. 62, *reprinted in* 1975 U.S. Code Cong. & Admin. News 469, 524-25; *see also* 121 Cong. Rec. 9781 (1975).

Consider the pregnant woman who suffers from:

- **AIDS** (Acquired Immune Deficiency Syndrome) — AIDS is the number one cause of death in New York City among women aged 25 to 34, the prime child bearing years when women most often use family planning clinics.[13] Joseph ¶ 7 (199 JA). "Viral disease theory suggests that pregnancy may accelerate the progression of HIV disease, AIDS and AIDS-related complex." Minkoff ¶ 7 (647A) (citation omitted); *see also* Morley ¶ 17 (228-29 JA);

- **acquired or congenital heart disease** — often cited as the most common non-obstetrical cause of maternal mortality. Rosenfield ¶ 10 (681A);

- **hypertension** — associated with up to 30% of maternal deaths and up to 22% of perinatal deaths. *Id.*, ¶ 11 (683A);

- **diabetes** — pregnant diabetics experience an increased risk of diabetic or insulin coma, leg edema, pre-eclampsia and infection. *Id.*, ¶ 12 (683A); *see* Rust ¶ 17(a) (254-55 JA);

- **sickle cell anemia** — pregnancy results in more frequent and severe crises, infections such as pneumonia, increasingly severe anemia, congestive heart failure and pulmonary complications such as embolus. Rosenfield ¶ 14 (684A); or

- **a malignant breast tumor that is estrogen receptor positive** — in which case pregnancy may accelerate the spread of cancer. *Id.*, ¶ 15.

Appropriate medical practice dictates that the Title X physician inform the pregnant woman who suffers from these (or other) potentially life-threatening diseases of the implications of such a diagnosis on her health, and on the fetus she is car-

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13 "Title X-funded clinics are . . . likely to serve a disproportionately high number of HIV positive pregnant women." Minkoff ¶ 6 (647A); *see* Joseph ¶ 8 (199 JA).

rying, and that pregnancy may accelerate the progression of the disease. The regulations, however, contemplate a far different scenario — one which conceals from these unfortunate women the dire consequences of carrying their pregnancy to term.

Because all abortion counseling is forbidden, the Title X physician is barred from informing the patient that her pregnancy poses serious health risks that may require an abortion to preserve her health and prolong her life. Even if the pregnant woman with AIDS, or cancer, or heart disease asks: "Doctor, can you give me some information about abortion?" or "Doctor, will an abortion prolong my life?" or "Doctor, where can I go for an abortion?" the Title X physician may only reply:

> [This] project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion. . . . [This] project can help [you] to obtain prenatal care and necessary social services, and provide [you] with a list of such providers from which [you] may choose.

§ 59.8(b)(5).

The counseling ban will also deny many women the option of making an informed choice not to carry and deliver a child with a severe or fatal birth defect. According to Dr. James H. Sammons, Executive Vice President of the American Medical Association:

> [C]ertain maternal disorders greatly increase perinatal mortality and morbidity and may require discussion of pregnancy termination as an option pursuant to providing full disclosure of medical information. For example, congenital abnormalities occur two to three times more often among children of diabetic women, and the abnormalities associated with prenatal diabetes are more severe and more often multiple and fatal. Similarly, a pregnant woman may be infected with a disease such as

> AIDS, rubella, herpes, cytomegalovirus or toxoplasmosis, that could have devastating effects on her fetus.
>
> In addition, some pregnant women may be at high risk of delivering a child with a severe genetic disorder. This group includes women of advanced maternal age (over 35) who are at an increased risk of having a child with a chromosomal abnormality such as Down's Syndrome; . . . women who previously had a child with a genetic disorder such as polycystic kidney disease; and women who have a history of multifactorial disorders such as anencephaly in their families.

Sammons ¶¶ 10, 11 (264-65 JA) (citations and footnote omitted).

The doctor's forced silence about the health risks posed by pregnancy and his canned response to questions about abortion may very well mislead the Title X patient into believing that her pregnancy will not accelerate the course of her disease or give her the mistaken impression that abortion is unsafe and illegal. *See* Merrens ¶¶ 15, 17 (284-86 JA); Drisgula ¶ 20 (154 JA).[14] Even for patients who are not so misled, the regulations' referral provisions impose severe obstacles to obtaining vital information and treatment.

Once pregnancy has been diagnosed, the regulations compel the Title X physician to refer the pregnant patient:

> for appropriate prenatal and/or social services *by furnishing a list of available providers that promote the welfare of mother and unborn child.* She must also be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept.

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14 *See Planned Parenthood Ass'n Chicago Area v. Kempiners*, 568 F. Supp. 1490, 1497 (N.D. Ill. 1983) (*on remand*) ("It is blinking at reality to say that a woman's counselor, who of necessity occupies a position of great trust and intimacy, discusses only childbirth and refuses to provide any information on abortion, will not have a critical impact upon the woman's decision whether to carry her pregnancy to term.")

§ 59.8(a)(2) (emphasis added). By prohibiting all discussion of abortion and limiting referrals only to health care providers "that promote the welfare of mother and unborn child," the medical needs of the individual patient are totally ignored. *See* Cohen ¶ 4 (509A); Tiezzi ¶ 8(c) (274 JA). Absent an immediate life-threatening emergency (*see* Point IB), the patient is affirmatively steered toward carrying her pregnancy to term even though an abortion may be medically warranted in the interests of her health. *See* Morley ¶ 17 (228-29 JA); Rust ¶ 17(a) (254-55 JA); Sammons ¶ 7 (263 JA); Rosenfield ¶¶ 5, 7 (679A-680A); Cohen ¶ 6 (510A).

The regulations further restrict a woman's access to responsible and complete option-counseling by forbidding a Title X project from using:

> prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning . . . *by including on the list of referral[s] . . . health care providers whose principal business is the provision of abortions* . . . .

§ 59.8(a)(3) (emphasis added).[15]

By excluding from the referral list providers whose "principal business" is providing abortions, the Secretary is effectively excluding virtually all abortion providers Title X patients have access to or can afford. *See* Henshaw ¶¶ 12, 21 (192, 195-96 JA); Gordon ¶ 3 (180 JA). Seventy percent of all abortions nationwide are performed at clinics which would likely be included within the "principal business" definition. *See* Henshaw ¶ 12 (192 JA). Allowed to remain on the list would be hospitals and private practitioners. However, most Title X patients cannot afford private physicians, for these providers generally do not accept Medicaid or charge fees on

15 Moreover, even if the patient asks which providers on the list perform abortions, the physician would be acting at his own risk to tell her. Section 59.8(a)(3) of the regulations forbids the use of referrals "as an indirect means of encouraging or promoting abortion . . . by 'steering' clients to providers who offer abortion . . . ."

a sliding scale basis, and few Title X patients carry any type of health insurance. *See* Drisgula ¶ 28 (156 JA); Gordon ¶¶ 3, 6-11 (180-83 JA); Henshaw ¶ 12 (192 JA); Pasternack ¶ 14(d) (673A-674A). Hospital costs for abortions also are prohibitive for most Title X patients. *See* Drisgula ¶ 28 (156 JA); Gordon ¶¶ 3, 6-9 (180-83 JA); Henshaw ¶ 12 (192 JA). Finally, many communities simply have no other public providers of abortion services. Randolph ¶¶ 10, 12, 14 (244-45 JA); Coombs ¶ 11 (144-45 JA); Merrens ¶ 5 (284 JA).

The Secretary attempts to disguise the harsh impact of the regulations by claiming that the pregnant woman who is diagnosed with a serious health condition can be "referred to the appropriate specialist for treatment of the condition." 53 Fed. Reg. 2932. Presumably, the specialist can counsel about abortion, assuming he is not a recipient of Title X funds. However, if the woman is not told that her pregnancy may jeopardize her health or endanger her life, she will not understand the need for immediate treatment. By the time she visits the specialist and is finally informed of her options, it may be too late or too dangerous to have an abortion, especially if the specialist has to refer her to yet another health care provider that performs abortions. *See* Gesche ¶ 16 (174-75 JA); Henshaw ¶¶ 15, 21 (193, 195-96 JA); Morley ¶ 12 (227 JA).

Delays in obtaining abortion will undoubtedly subject women to increased health risks.[16] The mortality risk for abortion increases 50% with each week after the eighth week of pregnancy, while the risk of major complications (morbid-

16 In invalidating the regulations as an undue burden on the right recognized in *Roe v. Wade*, 410 U.S. 113 (1973), the First Circuit stated:

> the regulations impose substantial delay and additional costs upon a woman desiring to terminate her pregnancy. Some low-income women may be unable to obtain any information on abortion at all without the help of [the] Title X clinic. For others, the delay between the moment when they learn of their pregnancy and the time they obtain information on abortion may greatly increase the risks inherent in the abortion procedure.

Massachusetts v. Secretary of Health & Human Servs., 899 F.2d at 67 (footnote omitted).

ity) increases about 30% each week after the eighth week. *See* Morley ¶¶ 12-13 (227 JA); *see also* Sammons ¶ 12 (266 JA); Cohen ¶ 3 (509A). Moreover, many women seeking abortions are unfamiliar with the procedure and the increased health risk associated with obtaining an abortion after the first trimester. Under the regulations, however, Title X providers are barred from telling their patients of this health risk and from encouraging them not to delay in deciding whether to have an abortion. *See* Merrens ¶ 16 (285 JA).

In sum, far from ensuring that low-income women receive adequate information and treatment to protect their health, the regulations' referral provisions foster exactly the opposite result. Lacking adequate information and counseling, some Title X patients will attempt carrying their pregnancy to term, blind to the fact that pregnancy may worsen a pre-existing condition and seriously endanger their health or life, with potentially devastating effects on the fetus. Others will carry unwanted pregnancies to term, either because of delays in finding a provider who can perform an affordable abortion or the inability to find an abortion provider altogether. Still others will obtain abortions from unlicensed providers at great physical risk or attempt dangerous self-abortions. *See* Rust ¶¶ 11, 14-15 (252-54 JA).

B. The Deleterious Impact Of The Regulations Is Not Lessened By The Vague Emergency Exception

The so-called emergency exception set forth in section 59.8(a)(2) of the regulations affords little solace to pregnant women suffering from serious health conditions which are aggravated or rendered life-threatening by pregnancy. Section 59.8(a)(2) provides:

> [in] cases in which emergency care is required . . . the Title X project shall be required only to refer the client immediately to an appropriate provider of emergency medical services.

By declining to define "emergency" except by reference to ectopic pregnancy (*see* 59.8(b)(2)),[17] the Secretary clearly indicates that an "emergency" is defined by the need for *immediate* surgery, and does not extend to conditions such as AIDS, cancer, hypertension, kidney disease and heart disease, all of which may be life-threatening to the mother and the fetus, although not necessarily requiring immediate action upon diagnosis. *See* Rosenfield ¶¶ 9, 21-22 (680A-681A; 687A-689A); Rust ¶ 17(a) (254-55 JA).

Even assuming the Secretary intended a broader reading of the exception, without any definition of "emergency," Title X providers are afforded no guidance as to which emergency referrals would be sanctioned under the regulations and which would not. Instead, the regulations leave it to bureaucrats to decide, on a case-by-case basis and after the fact, whether a particular condition met the Secretary's amorphous view of "emergency." Title X providers are left at risk of cessation of funding if a judgment is made with which the Secretary later disagrees.

The limited and obscure nature of the emergency exception emphasizes the extremely narrow authorization for referrals under the regulations, a narrowness that can endanger the life of the mother and fetus as well.

C. The Regulations Force Title X Practitioners To Conduct Themselves In A Manner Violative Of Legal And Ethical Standards Of Care, And Destroy The Integrity Of The Physician-Patient Relationship

In dictating what Title X physicians can say to their patients and what they cannot, the regulations violate the

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17 An ectopic pregnancy occurs when the fertilized ovum implants itself elsewhere than in the uterine cavity. It is the leading cause of death during the first trimester. Immediate surgery is necessary to curb potentially catastrophic events such as ruptured tubal pregnancy and massive hemorrhaging. *See* F. Cunningham, P. MacDonald & N. Gant, *Williams Obstetrics* (18th ed. 1989) 511-532; Centers for Disease Control, *CDC Surveillance Summaries* (September 1989), *MMWR* (Vol. 38, No. SS-2 1989) 1.

essence of informed consent and, as a result, destroy the integrity of the physician-patient relationship. All health care professionals would agree that "[w]ithholding of information concerning the progression of a fatal disease is unconscionable." Minkoff ¶ 8 (648A); *see also* Sammons ¶¶ 8, 9 (263-64 JA). Yet, in prohibiting the Title X provider from advising the pregnant woman that an abortion will prolong or save her life, the regulations compel such "unconscionable" results.

1. The Regulations Violate Principles Of Informed Consent As Embodied In State Statutes, Decisional Law And Canons Of Medical Ethics

A "root premise" of American jurisprudence is that "[e]very human being . . . has a right to determine what shall be done with his own body. . . ." *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972) (quoting *Schloendorff v. Society of New York Hosp.*, 211 N.Y. 125, 105 N.E. 92, 93 (1914)). The patient is able to exercise her right to make her own decisions about medical treatment only if the physician fully and accurately discloses all information necessary to permit her to make an informed choice. *Id.* at 780. This duty may further oblige the physician to advise the patient to consider one alternative over another depending on the circumstances. *Id.* at 781.

As this Court recently stated, "[t]he informed consent doctrine has become firmly entrenched in American tort law." *Cruzan v. Director, Missouri Dep't of Health*, 58 U.S.L.W. 4916, 4918 (U.S. June 25, 1990). The doctrine has been affirmatively recognized by common law[18] or by statute in

18 *See, e.g.*, cases collected in 69 A.L.R.3d 1250 (1988) ("Malpractice: Physician's Duty to Inform Patient of Nature and Hazards of Treatment in Pregnancy and Childbirth Cases Under the Doctrine of Informed Consent").

virtually every American jurisdiction.[19] In New York, for example, doctors are under a legal duty to provide a pregnant woman with "sufficient information concerning her condition and alternatives so that she [can] reasonably decide whether she [is] willing to undergo the entire pregnancy and deliver the child or abort the pregnancy . . . ." *Becker v. Schwartz*, 60 A.D.2d 587, 400 N.Y.S.2d 119, 119-120 (2d Dep't 1977) (citation omitted), *modified on other grounds*, 46 N.Y.2d 401 (1978).

Similarly, the New York Public Health Law requires a physician to "disclose [treatment] alternatives . . . and the reasonably foreseeable risks and benefits involved as a reasonable . . . practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation." N.Y. Public Health Law § 2805(d)(1) (McKinney Supp. 1990).

Canons of medical ethics are virtually uniform in their requirement of informed consent. It is fundamental that the physician present "the medical facts accurately to the patient . . . and make recommendations for management in accordance with good medical practice." *Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association* ¶ 8.07 (1986) (hereinafter "*Current AMA Opinions*") (80-81 JA).

The physician also has an "ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice." *Current AMA Opinions* ¶ 8.07 (81 JA); *see* Sammons ¶ 13 (266-67 JA); Rosenfield ¶¶ 5, 7 (679A-680A); Comment Letter of the APHA (Oct. 30, 1987) ¶ 3 (183A-184A). In so doing, the "physician is obliged to mention all alternative treatments, including those he or she does not provide or favor, so long as they are

19 *See* 3 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions: A Report on the Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship* (1982) Appendix L (hereinafter "President's Commission").

supported by respectable medical opinion." President's Commission at 76; see Katz ¶ 11 (208-209 JA).

Thus, "[i]n the event of an unwanted pregnancy, the physician should counsel the patient about her options of continuing the pregnancy to term and keeping the infant . . . [or] offering the infant for legal adoption, or aborting the pregnancy." American College of Obstetricians and Gynecologists ("ACOG"), *Standards for Obstetric-Gynecologic Services* at 57 (6th ed. 1985) (78 JA); *see* Morley ¶¶ 18-19 (229-30 JA); Comment Letter of ACOG (Nov. 2, 1987) at 4-6 (192A-194A). The physician is also ethically bound to "refer a patient for diagnostic or therapeutic services to another physician . . . or any other provider of health care services permitted by law to furnish such services, whenever he believes that this may benefit the patient." *Current AMA Opinions* ¶ 3.04 (80 JA).

By prohibiting all abortion counseling and slanting the referrals list in favor of health care providers that "promote the welfare of mother and unborn child," the regulations mandate that Title X physicians leave their patients singularly uninformed or misinformed about the risks associated with their pregnancy. Such deliberate manipulation of the physician-patient dialogue not only forces doctors to violate fundamental legal and ethical standards of care but will also expose Title X providers to malpractice suits, professional censure and loss of their licenses. *See* Morley ¶¶ 21-22 (230-31 JA); Katz ¶ 6 (207 JA).

The Secretary argues, however, that the ban on counseling and referral cannot result in the violation of informed consent by any Title X physician, because state laws impose informed consent obligations only on the doctor who will be treating the patient. Since the Title X program is barred from providing treatment related to pregnancy (or for other conditions unrelated to family planning), "it has no need to obtain consent to such treatment." 53 Fed. Reg. 2932.

In raising this specious argument, the Secretary diverts attention from the fact that the regulations compel Title X

providers to affirmatively mislead their patients. This, in and of itself, is unethical and illegal. In any event, the Secretary's argument is patently incorrect.

Case law in no way supports the suggestion that health care professionals, who diagnose a dangerous condition which they will not ultimately treat, do not have any informed consent obligations with respect to counseling and referral for treatment. In *Canterbury v. Spence*, the court held that the physician's duty to disclose goes far beyond mere diagnosis:

> A physician is under a duty to treat his patient skillfully but proficiency in diagnosis and therapy is not the full measure of his responsibility. The cases demonstrate that the physician is under an obligation to communicate specific information to the patient when the exigencies of reasonable care call for it. Due care may require a physician perceiving symptoms of bodily abnormality to alert the patient to the condition. It may call upon the physician confronting an ailment which does not respond to his ministrations to inform the patient thereof. It may command the physician to instruct the patient as to any limitations to be presently observed for his own welfare, and as to any precautionary therapy he should seek in the future. It may oblige the physician to advise the patient of the need for or desirability of any alternative treatment promising greater benefit than that being pursued. Just as plainly, due care normally demands that the physician warn the patient of any risks to his well-being which contemplated therapy may involve.

464 F.2d at 781 (footnotes omitted); *see also Schroeder v. Perkel*, 87 N.J. 53, 432 A.2d 834, 839-40 (1981) (even though pediatricians would not themselves be providing pregnancy care or treatment, they could be liable for depriving the woman of information necessary to decide whether to risk bearing a child with a genetic disorder).

The Secretary's argument is also contrary to Title X's statutory design. As demonstrated above (*see* pp. 6-8), far from requiring that Title X projects be hermetically sealed off from a broader concern with, and integrated care of, a woman's health, Congress intended that Title X providers carry out their normal responsibility to inform a patient of medical risks she presently faces and possible courses of action, including treatment and outside referral. Indeed, a Title X provider may be, at any given time, the only health care professional with whom a patient has any ongoing relationship.

Thus, although "[a] physician may choose to limit his practice to certain diagnostic services, he may not neglect a patient under his care." *Current AMA Opinions* ¶ 3.05. *See* Cohen ¶ 5 (509A) ("[t]he physician's duty to counsel a pregnant patient about the medical aspects of her pregnancy arises as soon as the doctor-patient relationship is established"); *see also* Sammons ¶ 15 (267-68 JA).

2. The Regulations Violate Congressional Intent And Disregard Decisions Of This Court Reflecting Adherence To The Doctrine Of Informed Consent

A clear indication of congressional intent is required to uphold federal regulations, such as those at issue here, which have the effect of displacing state regulation in areas, such as health care, which are traditionally left to state control. *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 644-45 (1986) (regulations promulgated by HHS relating to health care for handicapped infants held statutorily unauthorized because they effectively displaced the traditional authority of the states to regulate health care decisions without clear indication of congressional intent to do so).[20]

20 *See also Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985) (noting the "presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause[ ]"); *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 431-32 (1963); *cf. Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 144 (1963).

There is no evidence here that Congress, in enacting Title X, intended to preempt, override or in any way impair standards of acceptable medical practice or state informed consent law. Indeed, the legislative history demonstrates otherwise. The House Committee Report accompanying the 1974 reauthorization of Title X expressly stated that clients of Title X-funded clinics should receive "the basic elements of informed consent" including (i) "a description of any . . . risks reasonably to be expected . . ."; (ii) "a disclosure of any appropriate alternative methods or procedures that might be advantageous"; and (iii) "an offer to answer any inquiries concerning the procedures . . . ."[21] The Senate Committee Report accompanying the 1975 reauthorization of Title X reiterated that the principles of informed consent, including disclosure of medically appropriate alternatives, "must be applied with regard to the provision of any medical procedure or service" funded by Title X.[22]

Congressional intent is consistent with decisions of this Court which, while implicitly relying on the deeply embedded doctrine of informed consent, have repeatedly emphasized the "central role of the physician" in enabling a woman to exercise her right to reproductive choice. *Colautti v. Franklin*, 439 U.S. 379, 387 (1979); *see also Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 762-63 (1986); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 443-45 (1983); *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

As was recognized in *City of Akron*, "because abortion is a medical procedure," the physician must be accorded " 'the room he needs to make his best medical judgment.' " 462 U.S. at 427 (quoting *Doe v. Bolton*, 410 U.S. 179, 192). "The physician's exercise of this medical judgment encompasses both assisting the woman in the decision-making pro-

21 H.R. Rep. No. 1161, 93d Cong., 2d Sess. 18-19 (1974).

22 S. Rep. No. 29, 94th Cong., 1st Sess. 62 (1975), *reprinted in* 1975 U.S. Code Cong. & Admin. News 469, 525; *see also* 121 Cong. Rec. 9781 (1975).

cess and implementing her decision should she choose abortion." *City of Akron*, 462 U.S. at 427. Thus, this Court has struck down provisions in abortion statutes which attempted to officially structure the physician-patient dialogue so as to manipulate the woman's choice between childbirth and abortion. *Id.* at 444-45; *Thornburgh*, 476 U.S. at 762-64.

Relying on this Court's decisions noted above, the First Circuit and the District of Colorado concluded that the regulations strip the physician of his ability to exercise his best medical judgment. *See Massachusetts v. Secretary of Health & Human Servs.*, 899 F.2d at 66-68; *Planned Parenthood Fed'n of America v. Bowen*, 680 F. Supp. 1465, *summary judgment granted*, 687 F. Supp. 540 (D. Col. 1988):

> The regulations impermissibly interfere with the central role of the physician by limiting his discretion and thereby imposing upon him an "undesired and uncomfortable straitjacket" which is constitutionally intolerable. [They] prohibit a physician from providing women with neutral and often medically appropriate information about abortion, and also prohibit abortion referrals.
>
> In addition . . . the regulations not only prohibit the physician from giving certain information, but actually require the physician to provide specific, censored information to [the pregnant woman], even if the information does not comport with the physician's view of the best interests of his patient. The Government's interest in regulating abortion "does not permit it to adopt regulations that depart from accepted medical practice." *Akron*, 462 U.S. at 431, 103 S.Ct. at 2493.

680 F. Supp. at 1474-75 (citations omitted).

II. THE REGULATIONS' SEPARATION REQUIREMENT WILL SIGNIFICANTLY REDUCE THE AVAILABILITY OF QUALITY HEALTH CARE FOR LOW-INCOME WOMEN AND SERIOUSLY IMPEDE CONTINUITY OF CARE

Section 59.9 of the regulations requires that Title X-funded clinics be both physically and financially separate from programs engaging in "prohibited activities," with compliance to be determined on a case-by-case basis using an array of factors wholly within HHS' discretion. The separation requirement does grave injustice to a fundamental principle of sound public health care — that "[p]rovision of comprehensive integrated services results in higher quality health care." Bennett ¶ 24 (502A).

All Title X clinics rely on state and federal funding (other than Title X) to provide a variety of reproductive health services (*i.e.*, family planning, abortion, prenatal, obstetric and postpartum services). *See, e.g.*, Drisgula ¶ 4 (149 JA); Fink ¶¶ 5, 7 (161 JA); Bennett ¶ 6 (496A); Felton ¶ 7 (526A). For example, many of these clinics provide prenatal and obstetric services with grants under the Maternal and Child Health Services ("MCH") Block Grant, Title V of the Social Security Act, 42 U.S.C. § 701. *See* Gesche ¶¶ 12, 22 (173, 177 JA); Drisgula ¶ 25 (155 JA). Since the regulations prohibit abortion counseling and referral, a Title X clinic would no longer be able to provide MCH Block prenatal services such as genetic counseling or amniocentesis, which may result in counseling involving the abortion option. *See* Gesche ¶ 22 (177 JA).

Section 59.9 wholly ignores the logical nexus between option-counseling, prenatal or pregnancy-termination services, obstetric care and infant care and, instead, forces poor women to seek this range of services at different sites. In the words of Dr. Irving Rust:

> Particularly where teens are involved, integrated services are needed to facilitate enrollment in counseling and family planning programs. Many of our patients first

> visit the clinic for pregnancy testing or abortion services although they may need counseling, family planning or prenatal care. Because of the proximity of services and personnel, we are able to immediately channel a patient into a program which meets her needs. For example, post abortion patients are immediately enrolled in the Bronx Center's family planning program on the same premises, where after counseling and discussion with a staff health professional, they select a contraceptive method. . . . Prompt and successful enrollment of patients in counseling, family planning and pre-natal programs would be impossible if the services were provided on different sites from abortion and abortion-related services.

Rust ¶ 18 (256 JA); *see* Bennett ¶ 14 (498A-499A).

The separation requirement not only destroys continuity of care, but will also force many Title X clinics to curtail services or close altogether. According to the American Public Health Association:

> The fiscal ramifications of these requirements are enormous[.] [E]ven state health departments, many of which have spent many years and dollars on carefully integrating their health programs to achieve greater efficiency and accountability, would be deeply affected and legitimate services cut.

Comment Letter of the APHA (Oct. 30, 1987), ¶ 6 (186A); *see* Bennett ¶ 23, 28 (501A-502A, 503A-504A); Gesche ¶ 18 (175-76 JA); Tiezzi ¶ 9 (275-76 JA).

In striking down the separation requirement, the First Circuit recognized what the Secretary chose to ignore: Section 59.9 runs counter to congressional intent underlying the abortion prohibition in Section 1008 of the statute and undermines Title X's central purposes in three distinct ways. *See Massachusetts v. Secretary of Health & Human Servs.*, 899 F.2d at 59-60.

First, the original Conference Report on Title X stated that the abortion prohibition in Section 1008 was "not intended to interfere with or limit programs" supported with other than Title X funds.[23] The effect of the separation requirement is to do precisely that.

Second, the Senate Committee Report accompanying the 1975 reauthorization of Title X encouraged the provision of Title X family planning services:

> not only in specialty clinics, but, where such facilities do not exist or are impractical, in entities devoted to comprehensive health care for low-income families.
>
> . . . [I]t is essential that there be close coordination and, whenever possible, integration of family planning services into all general health care programs.[24]

By contrast, the separation requirement mandates fragmentation, not integration, of services.

Third, the statute itself requires a state plan for a "*coordinated* and *comprehensive* program of family planning services" as a prerequisite to any Title X grant to a state health authority. 42 U.S.C. § 300a(a) (1982) (emphasis added). For all of these reasons, the First Circuit concluded that Section 59.9 would be "completely contrary to the express Congressional intention to expand family planning services" because its effect would be to limit those services. *Massachusetts v. Secretary of Health & Human Servs.*, 899 F.2d at 60.

If Section 59.9 is allowed to stand, Title X programs will no longer serve as an entry point into the general health care system for millions of low-income women. Instead, forced separation will cause a retreat to the days of fragmented public health care — fragmentation which Title X was intended to remedy and has gone far to overcome.

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23 H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 5080, 5082.

24 S. Rep. No. 29, 94th Cong., 1st Sess. 66, *reprinted in* 1975 U.S. Code Cong. & Admin. News 469, 528.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the regulations struck down.

Respectfully submitted,

LARRY M. LAVINSKY
Counsel of Record
CHARLES S. SIMS
MICHELE M. OVESEY
ADAM JAY SHULMAN
Proskauer Rose Goetz
& Mendelsohn
300 Park Avenue
New York, New York 10022
(212) 836-1294

Attorneys for Amici Curiae

Of Counsel:

NADINE TAUB
Rutgers University School
of Law
15 Washington Street
Newark, New Jersey 07102

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CASE NOS. 89-1391, 89-1392

In The United States Supreme Court

October Term, 1990

DR. IRVING RUST, et al.,

Petitioner,

v.

DR. LOUIS SULLIVAN,

Respondent.

and

THE STATE OF NEW YORK, et al.,

Petitioner,

v.

DR. LOUIS SULLIVAN,

Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF ANTHONY J. CELEBREZZE, JR., ATTORNEY GENERAL OF OHIO,
ON BEHALF OF HIMSELF AND THE ATTORNEYS GENERAL OF THE STATES OF
ALASKA, CALIFORNIA, CONNECTICUT, DELAWARE, MAINE, MINNESOTA, NEBRASKA, NEW JERSEY, OREGON, TEXAS, VERMONT AND VIRGINIA,
AND THE CORPORATE COUNSEL FOR
THE DISTRICT OF COLUMBIA,
AMICI CURIAE IN SUPPORT OF PETITIONERS

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

RITA S. EPPLER
Chief, Federal Litigation Section
(Counsel of Record)

SUZANNE E. MOHR
JACK W. DECKER
Assistant Attorneys General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-5414

[Other Counsel Listed Inside Front Cover]

AVAILABLE COPY

HONORABLE DOUGLAS B. BAILY
Attorney General of Alaska
P.O. Box K, State Capitol
Juneau, Alaska 99811-0300
(907) 465-3600

HONORABLE JOHN K. VAN DE KAMP
Attorney General of California
1515 K Street
Sacramento, California 95814
(916) 324-7860

HONORABLE CLARINE NARDI RIDDLE
Attorney General of Connecticut
55 Elm Street
Hartford, Connecticut 06106
(203) 566-2026

HONORABLE CHARLES M. OBERLY, III
Attorney General of Delaware
820 North French Street, 8th Floor
Wilmington, Delaware 19801
(302) 571-3838

HONORABLE HERBERT O. REID, SR.
Corporate Counsel for the District of Columbia
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 727-6248

HONORABLE JAMES E. TIERNEY
Attorney General of Maine
State House Station 6
Augusta, Maine 04333
(207) 289-3661

HONORABLE HUBERT H. HUMPHREY, III
Attorney General of Minnesota
102 State Capitol
St. Paul Minnesota 55155
(612) 296-7537

HONORABLE ROBERT M. SPIRE
Attorney General of Nebraska
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

HONORABLE ROBERT J. DELTUFO
Attorney General of New Jersey
Richard J. Hughes Justice Complex
CN080
Trenton, New Jersey 08625
(609) 292-4925

HONORABLE DAVE FROHNMAYER
Attorney General of Oregon
100 Justice Building
Salem, Oregon 97310
(503) 378-6002

HONORABLE JIM MATTOX
Attorney General of Texas
P.O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 463-2100

HONORABLE JEFFREY L. AMESTOY
Attorney General of Vermont
Pavilion Office Building
Montpelier, Vermont 05602
(802) 828-3171

HONORABLE MARY SUE TERRY
Attorney General of Virginia
101 N. 8th Street, 5th Floor
Richmond, Virginia 23219
(804) 786-3898

QUESTIONS PRESENTED

Petitioners the State of New York and Dr. Irving Rust, *et al.*, have presented four questions each for review. The amici curiae herein wish to address the following:

1. Do new regulations promulgated by HHS under Title X of the Public Health Service Act which prohibit abortion counselling, referral and advocacy in programs funded under the Act and require physical separation of Title X funded facilities and facilities engaging in abortion-related services, violate the woman's and the health professional's First Amendment rights?

2. Does the regulations' prohibition of abortion counselling and referral in a Title X-funded program violate the woman's constitutionally protected privacy right to make a fully infomed decision on whether or not to continue her pregnancy?

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CASE NOS. 89-1391, 89-1392

In The United States Supreme Court

October Term, 1989

DR. IRVING RUST, et al.,

Petitioners,

v.

DR. LOUIS SULLIVAN,

Respondent.

and

THE STATE OF NEW YORK, et al.,

Petitioners,

v.

DR. LOUIS SULLIVAN,

Respondent.

BRIEF OF AMICUS CURIAE STATE OF OHIO IN SUPPORT OF PETITIONERS

STATEMENT OF THE CASE

Amici rely on the statement of the case set forth in the Petitioner's brief.

INTEREST OF AMICI CURIAE

This brief is filed by Anthony J. Celebrezze, Jr., Attorney General of Ohio, joined by the states of Alaska, California, Connecticut, Delaware, Maine, Minnesota, Nebraska, New Jersey, Oregon, Texas, Vermont and Virginia, and the corporate Counsel for the District of Columbia.[1] Amici either

[1] Most state agencies that receive and disburse Title X funds are members of the National Family Planning and Reproductive Health Association (NFPRHA) and are plaintiffs-appellees in *Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53 (8th Cir. 1990). This Court denied a motion to consolidate the Massachusetts case with the instant case. *See Sullivan v. Massachusetts*, Case No. 89-1929, 1990 U.S. Lexis 3528. The attorney general of Massachusetts is filing an amicus brief and supports this amicus brief.

participate directly as Title X grantees, or have public or private Title X grantees within their borders, through which health care services are provided to hundreds of thousands of citizens.[2] Amici now join together to urge this Court to reverse the judgment below.

The amended regulations to the Public Health Service Act, Title X, if permitted to go into effect, will force the amici to choose between accepting federal Title X funds under an objectionable program, and forfeiting receipt of Title X funding altogether. The former option will result in the invasion of the physician-patient relationship and the first amendment rights of both patients and health care providers; the transmittal of incomplete, misleading, and in some cases, medically dangerous information to pregnant women; and the ultimate frustration of the right to make an informed, independent decision whether to terminate a pregnancy. The latter option will reduce the monies available to fund family planning services. Either option will seriously undermine effective family planning and related health care services for low income women.

Agencies which both receive and disburse Title X funds have a unique interest in the amended regulations. Most of the amici provide matching funds from their own revenues to support Title X projects. The regulations, as amended, would expand the definition of "Title X Project" to require that non-federal funds also be used to provide women with misleading and possibly medically dangerous information which will undermine their right of choice. The amendments will impede the capacity of the amici to allocate state or local funds to provide balanced post-conception counselling and referral services even outside the ambit of the federal Title X program.

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[2] All of the amici states have local Title X grantees within their borders. State agencies in the amici states of Ohio, California, Nebraska, Oregon, Texas and The District of Columbia participate directly in the Title X program.

SUMMARY OF ARGUMENT

Amici support and join in the arguments presented by Petitioners and the American Public Health Association, et al. This brief, however, will focus on issues of particular concern to Ohio and the other amici.

The regulations at issue will result in provision of slanted and misleading information to women and will undermine, rather than promote, each woman's right to make an informed reproductive health decision. The regulations require a Title X physician to violate sound medical practice and professional ethics; unless the patient's life is in immediate danger, the amended regulations forbid a Title X physician from discussing the abortion option with a woman even when the abortion may be advisable to protect her health. Consequently, the health of many patients will be jeopardized. Many Title X providers are likely to refuse further participation in the program should the regulations go into effect. The low income women served by the program will have no alternative sources of care. Inevitably, fewer women will receive any family planning services. Consequently, unintended pregnancies will increase, and government costs for medical treatment, social services, and subsistence payments will soar.

The amended regulations cannot be upheld under the government's discretion not to fund certain programs, because the amendments curtail pure speech, and do so in a content-discriminatory manner. The regulations require the dissemination of information about childbearing but censor speech about abortion. The rigid exchange mandated between patient and health care professional bears the imprimatur of a government program, upon which the patient relies for full information about her choices. In fact, the option to terminate her pregnancy has not been disclosed. By intentionally misleading the patient regarding her choices, the regulations impose an impermissible obstacle to a woman's liberty and privacy rights to make an informed reproductive health decision.

In addition, the regulations impose an unconstitutional condition upon the receipt of a government benefit. Title X provides both grants to Title X clinics, and subsidies for medical, counselling and referral services to Title X patients. As a condition to receiving these benefits, both the patient and health care professional must relinquish their first amendment rights to exchange information about the termination of pregnancy. The first amendment prohibits the federal government from imposing this gag on pure speech.

Finally, the regulations extend far beyond a mere restriction on the use of federal funds. They redefine the scope of the Title X project in such a way that matching funds provided by amici would be swept within the new rules. The amendments do not promote the public welfare, the conditions for state participation are vague, the regulations contravene the purpose of Title X funding, and the rules would require state funds be used to defeat the constitutional rights of Title X patients. These conditions on the expenditure of state monies exceed constitutional limits on the spending power of Congress.

ARGUMENT

I. THE TITLE X AMENDED REGULATIONS WILL PROVIDE INCOMPLETE AND MISLEADING INFORMATION TO WOMEN MAKING REPRODUCTIVE HEALTH DECISIONS AND WILL RESULT IN DETERIORATION OF HEALTH CARE SERVICES TO LOW INCOME WOMEN.

Title X of the Public Health Service Act authorizes grants to for-profit and non-profit organizations "to assist in the establishment and operation of voluntary family planning projects," primarily for low income families. 42 U.S.C.A. Sections 300, et seq. (West 1982). Direct or indirect Title X grantees include state, county, and municipal health departments, family planning clinics, hospitals and community health organizations. Nationwide, there are about 2,500 different agencies operating some 5,100 clinics; eighty

percent of these receive Title X funding. Clinics operated by public health departments serve about forty percent of family planning patients. Forrest, *Delivery of Family Planning Services in the United States*, 20 Fam. Plan. Persp. 88, 92 (1988) [hereinafter *Delivery of Services*].

In 1987, federal and state governments spent a total of 386 million dollars for family planning services. Title X grants accounted for thirty-four percent of this total. Other federal funding sources included Medicaid reimbursement, Social Services block grants, and Maternal and Child Health block grants. State governments provided thirteen percent of the total public funding for family planning services. Gold and Guardado, *Public Funding of Family Planning, Sterilization and Abortion Services, 1987,* 20 Fam. Plan. Persp. 228 (1988). States which receive Title X funds are required to provide a minimum of ten percent in matching funds. 42 U.S.C.A. Section 300a-4 (West 1982).

A sampling of eight amici states shows over 1.1 million women received family planning services through Title X regulated programs in these states alone.[3] *See* Appendices A-H. Public funding from combined sources in these eight states amounted to over 117 million dollars, twenty-eight percent of which was from federal Title X grants. *Id.* The eight states provided twenty percent of family planning services support for a total contribution of more than 24 million dollars. *Id.*

Nationwide, subsidized clinics serve nearly five million women per year. Ninety percent of these women receive pregnancy prevention services. Nine percent of all visits (thirteen percent of all initial visits, and twenty percent of all visits by teenagers) involve a pregnancy test. Only about four percent of all patients are pregnant when they come

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[3] California, Maine, Massachusetts, Ohio, Vermont and Virginia provided statistics showing the total women served in 1989 and funds allotted for 1990. See Appendices A-C, E, and G-H. Nebraska and Texas provided statistics showing the total women served and funds allotted for calendar year 1989. See Appendices D and F.

to the clinic. Rosoff, *Taking Family Planning Out of Title X: The Impact of the Proposed New Regulations*, 19 Fam. Plan. Persp. 222, 223 (1987) [hereinafter *New Regulations*].

The Title X clientele is composed of those women in greatest need of objective information about their health and pregnancy options, and those least able to obtain that information independent of public assistance. Eighty-three percent of clinic patients have incomes below 150 percent of the poverty line. Thirteen percent receive welfare. Thirty-two percent are under 20 years of age, and 14 percent are under 18 years of age. *Delivery of Services* at 92. A teenager is in particular need of "mature advice and emotional support" in making the "grave decision" whether to carry a child to term. *Hodgson v. Minnesota*, 58 U.S.L.W. 4957, 4974 (June 25, 1990) (Kennedy, J. Concurring and Dissenting). *See also, Planned Parenthocd of Missouri v. Danforth*, 428 U.S. 52, 91 (1976) (Stewart, J., Concurring).

A. THE AMENDED REGULATIONS WILL SUPPRESS THE FLOW OF COMPLETE MEDICAL INFORMATION NECESSARY FOR INFORMED CHOICE.

Despite Congress' numerous refusals to amend Title X to bar use of federal funds to inform women of the availability of abortion, the United States Department of Health and Human Services (hereinafter HHS) elected to accomplish the same result in 1987 by administratively "reinterpreting" the Act. *See* McCarthy, *The Prohibition on Abortion Counseling and Referral in Federally-Funded Family Planning Clinics*, 77 Calif. L. Rev. 1181, 1183 (1989). In so doing, HHS rejected its own longstanding position that the Act required "non-directive" counselling of pregnant patients regarding both abortion and its alternatives. *State of New York v. Sullivan*, 889 F.2d 401, 405 (2d Cir. 1989).

The HHS regulations now declare the Title X family planning function must terminate with pregnancy and forbid the clinic to provide counselling or referrals for an abortion. 42 C.F.R. Sections 59.2 and 59.8(a)(1) (1988). However, the

clinic is affirmatively required to refer the pregnant patient "for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child," except when an emergency abortion is required to protect the life of the mother. 42 C.F.R. Section 59.8(a)(2) (1988). Any referral list given to the patient must exclude "health care providers whose principal business is the provision of abortions," but may not exclude, for any reason, any agency which does not provide abortions. 42 C.F.R. Section 59.8(a)(3) and (b)(4) (1988). Under the amended regulations a physician would be precluded from raising the issue of abortion or responding to questions raised by a patient, even if childbearing would threaten the health of the mother, or pose a non-emergency threat to the life of the mother. 42 C.F.R. Section 59.8(b) (1988).

In case there is any doubt about the meaning or intent of the regulations, it is resolved by the examples contained therein. If a patient asks her physician whether an abortion is medically advisable, or even simply requests a referral for an abortion, the response, scripted by the amended regulations, must be, "The project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion . . . [T]he project can help [you] to obtain pre-natal care . . ." 42 C.F.R. Section 59.8(b)(5) (1988). The woman must then be given a list of all providers of pre-natal care from which any providers whose principal business is abortion have been excised.[4] The list may neither include an abortion clinic, nor exclude a provider of pre-natal services. 42 C.F.R. Sections 59.8(b)(3) and (b)(4) (1988). A woman requesting abortion referral services may not even be given the Yellow Pages to locate and call an abortion provider herself, since the telephone book constitutes a "list" which may contain "forbidden" providers. 53 Fed. Reg. 2922, 2942 (1988).

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[4] This requirement censors referrals to most possible abortion sources for low income women. Eighty-three percent of all induced abortions are performed at specialized abortion clinics. In 1983, only three percent of family practitioners and forty-two percent of gynecologists would provide an abortion. *Delivery of Services* at 90.

In the decision below, the concurring judge found these regulations "jeopardize[ ] the ability of Title X physicians to safeguard the health of those seeking their expert advice." *State of New York v. Sullivan,* 889 F.2d at 415 (Cardamone, J., concurring). The ban on providing even a telephone book to a needy client was deemed "a small and petty contrivance, inconsistent with our nation's high principles." *Id.* The HHS regulations not only frustrate a woman's individual choice, but also affect the entire health care system for low income women.

B. THE AMENDED REGULATIONS WILL RESULT IN DETERIORATION OF HEALTH CARE SERVICES TO THOSE IN MOST DESPERATE NEED.

The reach of the amended regulations extends far beyond the mere expenditure of federal dollars. "Title X Programs" and "Title X Projects" as redefined include not only direct federal subsidies, but any other funds, public or private, used in the Title X project. 42 C.F.R. Section 59.2 (1988). If a state contributes to the Title X project, or if the clinic uses its own private funds to support Title X activities, the use of these alternative funds is likewise held hostage to the Title X requirements, and is gagged as well.

If subjected to the new regulations, fewer practitioners will remain available to serve Title X patients. The right to informed consent based on full information is central to the codes of ethics for all professional groups which provide pregnancy-related services. *See New Regulations* at 224. The National Family Planning and Reproductive Health Association (NFPRA), which represents eighty-five percent of Title X recipients, predicts that the majority would refuse to subject themselves to the new regulations. Comment, *The Title X Family Planning Gag Rule Can the Government Buy Up Constitutional Rights?* 41 Stan. L. Rev. 401, 408 (1989). Providers of family planning services to low income women cannot easily be replaced. As it is, of the 9.5 million women in this country with family incomes below 150 percent of the poverty level, 4.5 million are receiving no organized family

planning services. Torres and Forrest, *Family Planning Clinic Services in U. S. Counties, 1983,* 19 Fam. Plan. Persp. 54, 57 (1987).

Publicly funded family planning services, which will be sacrificed because of ideological objections to balanced counselling and referral for the four percent of Title X patients who are pregnant, play an indispensable role in preventing millions of unintended pregnancies. Researchers estimate the use of contraceptives from publicly funded sources is responsible for preventing up to 3.1 million unintended pregnancies annually. Forrest and Singh, *Public-Sector Savings Resulting from Expenditures for Contraceptive Services,* 22 Fam. Plan. Persp. 6, 11 (1990). Savings in public social service and welfare costs from contraceptive use by women relying on publicly funded providers represents up to $11.26 for each dollar spent to provide family planning services; the annual savings is an estimated 4.6 billion dollars. *Id.* at 11-12. Thus a cost beneficial program is scuttled to prevent four percent of the women it serves from discovering that they may obtain an abortion.

The regulations pose a Hobson's choice for any states which do not agree that pregnant women are best served by state-enforced ignorance of their options. If states forego Title X assistance, less funding will remain to subsidize Title X services. If states remain in the program, their own funds will be held hostage to requirements with which the states may vehemently disagree, many providers will refuse to participate, and those who remain will be required to conceal options when medical judgment may mandate disclosure. Either way, services to low income women and teenagers will suffer.

II. THE DECISION OF THE SECOND CIRCUIT CONTRAVENES RULINGS OF THIS COURT WHICH PROTECT THE PRIVACY, LIBERTY, AND FIRST AMENDMENT INTERESTS OF WOMEN IN MAKING INFORMED CHOICES REGARDING THEIR REPRODUCTIVE HEALTH, AND WHICH PROHIBIT THE USE

OF FEDERAL SPENDING TO INFLUENCE IMPROPERLY A STATE'S DISPOSITION OF ITS OWN RESOURCES.

This Court has held that the government may, in the exercise of its spending powers, flatly decline to pay for the medical procedure of abortion, *Harris v. McRae,* 448 U.S. 297, *reh. denied,* 448 U.S. 917 (1980); *Maher v. Roe,* 432 U.S. 464 (1977); or refuse to permit the procedure to be performed in government-owned facilities, *Webster v. Reproductive Health Services,* 109 S. Ct. 3040 (1989), notwithstanding a woman's constitutional right to freedom of reproductive choice. *Roe v. Wade,* 410 U.S. 113 (1973); *Griswold v. Connecticut,* 381 U.S. 479 (1965). This Court's decision in *Webster* did not address the issues presented herein, as the majority concluded the first amendment question presented by the prohibition of abortion counselling and referral by publicly funded family planning clinics was moot. 109 S. Ct. at 3053-54. It was noted that a constitutional issue could arise if the statute were interpreted to prohibit publicly employed health professionals from giving specific medical advice. *Id.* at 3060 (O'Connor J., concurring), 109 S. Ct. at 3069 n.1 (Blackmun J., concurring/dissenting).

A. THE AMENDED REGULATIONS IMPOSE AN IMPERMISSIBLE OBSTACLE TO A WOMAN'S PERSONAL REPRODUCTIVE CHOICE IN VIOLATION OF HER LIBERTY AND PRIVACY RIGHTS AS PROTECTED BY THE CONSTITUTION.

Whatever degree of constitutional protection a woman's choice to terminate her pregnancy may enjoy, it is clear that, at the very least, the government may not impose obstacles to thwart the abortion decision. *Harris v. McRae,* 448 U.S. at 314; *Maher v. Roe,* 432 U.S. at 473. The HHS regulations fail even this minimal test.

This Court's decisions have made it clear that central to the woman's privacy right is the opportunity to make an informed decision. *See Thornburgh v. American College of*

Obstetricians and Gynecologists, 476 U.S. 747, 759, 762 (1986); *City of Akron v. Akron Center for Reproductive Health,* 462 U.S. 416, 429-30 (1983). As observed in another context by the United States Court of Appeals for the District of Columbia Circuit:

> The root premise is the concept, fundamental in American jurisprudence, that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body . . . ." True consent to what happens to one's self is the informed exercise of a choice, and that entails an *opportunity to evaluate knowledgeably the options available and the risks attendant upon each.* The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision.

Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972) (emphasis added) (footnotes omitted), *cited* in *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. at 799 (White, J., dissenting); *see also Cruzan v. Missouri Dept. of Health,* 58 U.S.L.W. 4916, (June 25, 1990).

The Second Circuit determined, on the basis of *Maher, Harris,* and *Webster,* that no one has the "right" to federally-funded abortion counselling. *State of New York v. Sullivan,* 889 F.2d at 410-12. The lower court reasoned that a pregnant woman, therefore, is left in the same position as if the government had funded no counselling at all, and none of her rights are infringed. *Id.* The conclusion, that a woman is constitutionally unharmed by this funding decision, defies reality, and constitutes slight of hand with what is actually being funded.

Despite the regulations' disingenuous disclaimer that pregnancy counselling and referral are now beyond the scope of Title X family planning services, the rules *do* provide

for federal funding of a counselling and referral conversation between health care professional and patient. The Title X clinic is required to "counsel" the patient by telling her that the project deems abortion to be an inappropriate option, and it must "refer" her to providers of pre-natal care even if she inquires about an abortion. 42 C.F.R. Section 59.8(b)(5) (1988). Rather than simply refusing to subsidize counselling and referral, the regulations endeavor to censor the contents of the funded counselling and referral to conceal the abortion option from the patient.

Therefore, the patient does not remain in the same position as she would have been had the government decided not to fund any Title X services. As found by the First Circuit:

> We are particularly struck by the effect these restrictions have on poor women who are forced to rely on Title X clinics. They are significantly worse off than they would have been if the government had not provided the clinics because they have received misinformation rather than no information about their options. In addition, because most Title X clients pay a portion of the cost of the services (based on a sliding scale), the client's ability to go elsewhere has been significantly diminished because she has already paid what she could afford to the Title X clinic.

Massachusetts v. Secretary of Health and Human Services, 899 F.2d 53, 70 (1st Cir. 1990) (en banc).

The amended regulations pose a trap for the unsophisticated and unwary patient. The exchange between the woman and Title X professional has all the appearances of government-sponsored counselling and referral, from which the patient is likely to conclude she has received full information. But only an incomplete counselling and referral has occurred, and the patient has been affirmatively misled.

The government can therefore arguably remain neutral, in the same sense it has been deemed by this Court to remain

neutral in refusing to fund the entire abortion procedure, only by refusing entirely to fund any counselling and referral procedure. Neutrality can be accomplished only either by full disclosure of all options or by refusal to discuss *either* abortion or childbirth options with the patient, and by refusal to make *any* referrals to either pre-natal care or abortion service providers.[5] Otherwise, the regulations do not simply fail to remove obstacles to abortion; they create obstacles.

This case does not present a question which may be simply resolved on the basis of the government's power to tax and spend. The distorted information required to be dispensed compromises the patient's right to make a fully informed choice. As found by the Eighth Circuit in striking down a similar state ban on the use of state funds to counsel or encourage abortion:

> We think that the state's analogy of its ban on "encouraging or counselling" to bans on public abortion funding is completely inapt. Missouri is not simply declining to fund abortions when it forbids its doctors to encourage or counsel women to have abortions. Instead, it is erecting an obstacle in the path of women seeking full and uncensored medical advice about alternatives to childbirth. The state's limitation on doctor-patient discussions reflects the state's choice for childbirth over abortion in a way that prevents the patient from making a fully informed and intelligent choice.

Reproductive Health Services v. Webster, 851 F.2d 1071, 1080 (8th Cir. 1988), *rev'd on other grounds*, 109 S. Ct. 3040 (1989). This finding was not disturbed in this Court's *Webster* decision. *See supra* at 10.

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[5] Of course, a refusal to provide *any* counselling or referral would not be consistent with the authorizing statute. 42 U.S.C.A. Sections 300, et seq. (West 1982). Nor would a ban on providing any information about health risks on abortion necessarily comport with the woman's privacy and liberty interests in informed consent, or with the first amendment.

In *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. at 444-45, this Court struck down an ordinance which required the physician to inform the patient of a "parade of horribles" which implied that the abortion procedure was particularly dangerous. The compulsory provision of misinformation to the patient was deemed to have imposed an "undue obstacle" to her freedom of reproductive choice. Eventually, even two of the three dissenters in *City of Akron* apparently agreed with this result:

> I have no quarrel with the general proposition, for which I read *Akron* to stand, that a campaign of state promulgated disinformation cannot be justified in the name of "informed consent" or "freedom of choice."

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. at 800 (White, J., joined by Rehnquist, J., dissenting).

One is unable to choose between two options if one is kept unaware by the government that one has a choice at all. Deliberately incomplete and misleading information about one's options is indistinguishable from the "disinformation" at issue in *City of Akron*. Consequently, the result in this case should be the same. Because the counselling and referral required by the amended regulations create the impression of full disclosure while concealing the option to terminate pregnancy, the government has imposed an impermissible obstacle to a woman's right to choose. This Court should find the amended regulations violate the constitutional privacy and liberty interests in freedom of reproductive choice.

B. THE AMENDED REGULATIONS VIOLATE THE FIRST AMENDMENT RIGHTS OF TITLE X PATIENTS AND HEALTH CARE PROVIDERS.

Maher, Harris, and *Webster* held that the government's control over its own purse strings justified a refusal to fund, or permit on its premises, abortion *procedures*, while at the

same time funding and permitting childbirth *procedures*. These cases did *not* reach the question whether the federal government may use its considerable taxing and spending powers to suppress *speech* regarding the advisability of abortion. Because the contested rules directly suppress speech, the reliance placed by HHS and the Second Circuit on *Maher, Harris*, and *Webster* is misplaced.

Certainly, the government may constitutionally warn its citizens of the risks of smoking or the evils of drug abuse. A traditional public health campaign is designed to impart information, not to censor it — to persuade, not to manipulate. The HHS regulations, however, embody a program of official subterfuge, the thrust of which is not merely to take sides in the abortion debate, but to squelch any debate by hiding the abortion option. As opposed to persuasion, official manipulation and censorship offend the core values of the first amendment.

This case does not involve internal management of a proprietary governmental operation, *United States v. Kokinda*, 58 U.S.L.W. 5013, 5014-15 (June 27, 1990) (plurality opinion), or the rights of government employees, *Connick v. Myers*, 461 U.S. 138 (1983), where first amendment rights must sometimes yield to the government's interests as an employer. Here the government is granting a subsidy to private or independent public health care professionals, many of whom were providing family planning and abortion referral services long before Title X was enacted. Dryfoos, *Family Planning Clinics-A Story of Growth and Conflict*, 20 Fam. Plan. Persp. 282, 283 (1988). The decisions of this Court are clear that the government cannot condition receipt of a government subsidy upon manipulation of first amendment rights of the grantees.

In *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980), this Court struck down a state regulation which forbade a public utility from inserting into its billings any discussion of "political matters," including advocacy of nuclear power. Naturally, public utilities are heavily regulated entities which enjoy a state subsidy in the form of a state-

created monopoly. *Id.* at 549 (Blackmun, J., dissenting). This Court noted:

> The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. . . . If the marketplace of ideas is to remain free and open, governments must not be allowed to choose "which issues are worth discussing or debating" To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.

Id. at 537-38, *quoting, Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 96 (1972) (additional citations omitted).

Other decisions of this Court have clearly suggested that the government's privilege to subsidize or refuse to subsidize speech ends where the funding choice is no longer content-neutral. *Regan v. Taxation with Representation,* 461 U.S. 540 (1983), involved federal subsidies to charitable organizations in the form of tax deductions for contributions to these entities. This Court held that Congress could refuse to subsidize all lobbying activities by 501(c)(3) charitable organizations without violating those organizations' first amendment rights. This Court was careful to point out, however, that the restriction on deductability for lobbying was content neutral. "The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to '"ai[m] at the suppression of dangerous ideas."'" *Id.* at 548, *citing, Cammarano v. United States,* 358 U.S. 498, 513 (1959), *quoting, Speiser v. Randall,* 357 U.S. 513, 519, *reh. denied,* 358 U.S. 860 (1958).

Similarly, in *F.C.C. v. League of Women Voters,* 468 U.S. 364 (1984), this Court struck down a prohibition of on-air "editorializing" by publicly-subsidized educational television stations. While arguing the content-neutral ban should be upheld as a permissible election not to subsidize on-air editoralizing, the dissent noted:

> This is not to say that the Government may attach any condition to its largess; it is only to say that when the Government is simply exercising its power to allocate its own public funds, we need only find that the condition imposed has a rational relationship to Congress' purpose in providing the subsidy and that it is not primarily '"'aimed at the suppression of dangerous ideas."'"

Id. at 407, (Rehnquist, J., dissenting), *quoting Cammarano v. United States,* 358 U.S. at 513, in turn *quoting Speiser v. Randall,* 357 U.S. at 519, in turn *quoting American Communications Assoc. v. Douds,* 339 U.S. 382, 402 (1950). *See also Arkansas Writers' Project v. Ragland,* 481 U.S. 221 (1987).

Because the challenged regulations directly affect speech in either a content-or viewpoint-discriminatory manner, and are manifestly aimed at suppressing the "dangerous idea" of abortion, they cannot be upheld on the basis of *Maher, Harris, and Webster.*

Rather, this Court has long held that the state may not condition receipt of a valuable benefit on the forfeiture of a constitutional right. In *Perry v. Sindermann,* 408 U.S. 593, 597 (1972), the Court declared:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech .... This would allow the government to "produce a result which [it] could not command directly."

Citing Speiser v. Randall, 357 U.S. at 526 (tax exemption subsidy cannot be conditioned on forced speech); *see also*

Rutan v. Republican Party of Illinois, 58 U.S.L.W. 4872 (June 21, 1990); *Elrod v. Burns*, 427 U.S. 347 (1976) (conditions of public employment cannot be conditioned on forfeiture of rights to political association); *Sherbert v. Verner*, 374 U.S. 398 (1963) (unemployment benefits cannot be conditioned on relinquishment of religious convictions).

Clearly, the federal government could not condition tax benefits to Title X clinics on whether abortions were advised. Nor could all welfare benefits be cut off to women who advocate abortion. Nor may HHS condition the grant of Title X subsidies to family planning providers, and the grant of Title X subsidized counselling and referral services to low income women, on both parties' relinquishment of their mutual first amendment rights to exchange full and complete information about reproductive choices. *See Bigelow v. Virginia*, 421 U.S. 809 (1975).

C. THE AMENDED REGULATIONS IMPOSE UNCONSTITUTIONAL CONDITIONS UPON THE EXPENDITURE OF STATE FUNDS COMMITTED TO TITLE X PROJECTS.

In addition to jeopardizing seriously the interests of women in full information regarding their reproductive health, and inhibiting the ability of health care professionals to provide this information, the amended regulations also affect the ability of states to use state revenues as they see fit to fund Title X projects. The amended regulations redefine "Title X project" to include not only the federal Title X grant, but also state, local, or private funds.

The regulations run afoul of the Constitution's Spending Clause. U.S. Const. art. I, Section 8. In *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987), this Court recently summarized the four separate constitutional limitations upon federal use of its spending power to influence a state's exercise of its own constitutional powers: 1) the federal spending exercise must be in pursuit of the "general welfare," and Congress is entitled to substantial deference in determining what the "general welfare" may be; 2) any conditions on state

acceptance of the grant must be unambiguous, in order that the state may know in advance the consequences of its participation; 3) the conditions must be related to the purpose of the federal expenditure; and 4) the federal spending power may not be used to induce the states to engage in activities which are themselves unconstitutional. The amended regulations fail all four tests.

First, keeping women in the dark regarding their reproductive options is not in anyone's best interest. Rather, this approach is directly antithetical to the philosophy, firmly embedded in the first amendment, that the public interest is best served by the free competition of ideas in the marketplace of public opinion. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Further, as eloquently detailed in the *amicus* brief of the American Public Health Association, there are numerous circumstances under which the absolute prohibition on abortion referral will result in serious jeopardy to the health of the mother and will violate sound medical practice. Moreover, it is impossible to give deference to Congress' determination of the public interest when the amended regulations appear more a product of administrative fiat than an expression of Congressional intent. *See* Petition of State of New York *et al.*, pp. 16-24; Petition of Dr. Irving Rust, pp. 20-27.

Second, some of the regulations impose conditions on state spending which are far from clear. For example, 42 C.F.R. Section 59.9 (1988) requires that at least some personnel or facilities used for "prohibited activities" be separate from those used for Title X activities, even if the prohibited activities are not funded by Title X. The separation requirements are merely factors to be considered by the Secretary of HHS in deciding whether a grantee is in violation of the regulations. The rule contains virtually no standards from which HHS bureaucrats may determine compliance, except that "mere bookkeeping separation" is insufficient. *Id.* Participating states will remain unsure under what circumstances they may separately fund "prohibited" abortion counselling and referral activities, without undergoing the crippling expense of employing separate

personnel or obtaining separate physical facilities.

Third, Title X is, first and foremost, a public health program. The amended regulations operate in a manner contrary to the Congressionally mandated purpose for the spending, in the same manner that they operate contrary to the "public welfare." Fourth, the amended regulations would induce the states to use state monies to support services performed in a manner that violates the constitutional rights of women and health care professionals.

The new regulations reflect far more than a value judgment affecting the expenditure of federal dollars. The regulatory scheme also conditions states' participation in Title X upon state acceptance of identical limitations on use of state funds, regardless of state policy. And the rules construct obstacles to the states' separate funding of balanced counselling and referral services which cannot be justified by the need to account separately for Title X funds. Therefore, the amended regulations are unconstitutional under *South Dakota v. Dole.*

CONCLUSION

For all the foregoing reasons, the Court should reverse the decision of the Second Circuit Court of Appeals.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General

RITA S. EPPLER
Chief, Federal Litigation Section
(Counsel of Record)

SUZANNE E. MOHR
JACK DECKER
Assistant Attorneys General
State Office Tower, 26th Floor
30 E. Broad Street
Columbus, Ohio 43266-0410
(614) 466-5414

CALIFORNIA

	(A)	(B)	(C)	(D)	(E)	(F)	(G)
	Total Women	Women at or below 150% of poverty	Title X Award	Non-Title X	State Funds	MCH Block	Total Columns (C) - (F)
Los Angeles Regional Family Planning Council	151,609	129,949	$4,841,331	$9,127,980	$7,505,700	N/A	$21,475,011
California Family Planning Council	262,959	216,391	7,483,349	18,739,469	N/A	N/A	26,222,818
TOTALS	414,568	346,340	$12,324,680	$27,867,449	$7,505,700	$ N/A	$47,697,829
			25.84%	58.42%	15.74%		100%

NOTES:

1. Total number of women served and dollars reflected represents Basic Contraceptive Services for fiscal year 1988-1989.
2. N/A = Information is not available.
3. Column B reflects the number of women in Column A whose incomes are at or below 150% of the federal peverty guidelines.
4. The total of Columns C-F reflects funds that are subject to Title X regulations.
5. California Family Planning Council (CFPC) requires reporting by agencies of non-Title X funds. This total amount, including state funds, is reflected in Column (D). A detailed breakdown of non-Title X funds is not available for CFPC.

MAINE

	(A)	(B)	(C)	(D)	(E)	(F)	(G)
	Total Women	Women at or below 150% of poverty	Title X Award	Non-Title X	State Funds	MCH Block	Total Columns (C) - (F)
Family Planning Association of Maine	32,460	24,353	$818,000	$1,875,000	$1,440,000	$ - 0 -	$4,133,000
			19.79%	45.37%	34.84%		100%

NOTES:

1. Total number of women served (Column A) reflects 1989 figures. The balance of the Columns (C-G) reflect figures from fiscal year 1990.

2. Column B reflects the number of women in Column A whose incomes are at or below 150% of the federal poverty guidelines.

3. The total of Columns C-F reflects funds that are subject to Title X regulations.

MASSACHUSETTS

	(A) Total Women	(B) Women at or below 150% of poverty	(C) Title X Award
Family Planning Clinics	88,000	76,560	$3,055,425
			37.47%

NOTES:

1. Total number of women served (Column A) reflects 1989 figures. The balance of the columns (C-G) reflect figures from calendar year 1989.

2. Column B reflects the number of women in Column A whose incomes are at or below 200% of the federal poverty guidelines.

3. The total of Columns C-F reflects funds that are subject to Title X regulations.

(D)	(E)	(F)	(G)
Non-Title X	State Funds	MCH Block	Total Columns (C) - (F)
$2,640,000	$2,460,000	$ N/A	$8,155,425
32.37%	30.16		100%

NEBRASKA

	(A) Total Women	(B) Women at or below 150% of poverty	(C) Title X Award
Nebraska Department of Health	24,521	19,369	$935,000
			41.28%

NOTES:

1. Total number of women served (Column A) reflects 1989 figures. The balance of the Columns (C-G) reflect actual figures from fiscal year 1989.

2. Total in Column A reflects unduplicated female users.

3. The total in Column B reflects the total unduplicated female users in Column A whose incomes are at or below 150% of the federal poverty guidelines.

4. Non-Title X includes first, second and third party reimbursement such as patient fees, insurance, and medicaid as well as funds from other source.

5. Maternal and Child Health Block Grant.

(D)	(E)	(F)	(G)
Non-Title X	State Funds	MCH Block	Total Columns (C) - (F)
$1,069,853	$ -0-	$259,964	$2,264,817
47.24%		11.48%	100%

OHIO

	(A)	(B)	(C)	(D)	(E)	(F)	(G)
	Total Women	Women at or below 150% of poverty	Title X Award	Non-Title X	State Funds	MCH Block	Total Columns (C) - (F)
Ohio Dept. Of Health	87,787	73,137	$2,932,323	$3,219,015	$431,000	$275,000	$6,857,338
Federation For Community Planning (Cleveland)	28,685	27,369	1,017,761	1,232,863	126,500	- 0 -	2,377,124
Planned Parenthood Summit, Portage and Medina Counties	15,051	13,490	525,230	1,518,763	55,000	- 0 -	2,098,993
Planned Parenthood Central Ohio	10,543	9,054	435,770	1,064,230	33,000	- 0 -	1,533,000
TOTALS	142,066	123,050	$4,911,084	$7,034,871	$645,500	$275,000	$12,866,455
			38.17%	54.68%	5.02%	2.14%	100%

NOTES:

1. Total Women provided family planning services through Title X activities.
2. Column B reflects the number of women in Column A whose incomes are at or below 150% of the federal poverty guideiines.
3. Non-Title X includes first, second and third party reimbursement such as patient fees, insurance and medicaid as well as agency operating funds.
5. The total of Columns C-F reflects funds athat are subject to Title X regulations.

TEXAS

	(A)	(B)	(C)	(D)	(E)	(F)	(G)
	Total Women	Women at or below 150% of poverty	Title X Award	Non-Title X	State Funds	MCH Block	Total Columns (C) - (F)
Texas Dept. of Health	328,497	244,730	$7,960,524	$13,502,198	$3,540,301	$2,460,209	$27,463,232
			28.99%	49.16%	12.89%	8.96%	100%

NOTES:

1. Total number of women served (Column A) reflects 1989 figures. The balance of the columns (C-G) reflect figures from calendar year 1989.

2. Column B reflects the number of women in Column A whose incomes are at or below 150% of the federal poverty guidelines.

3. The total of Columns C-F reflects funds that are subject to Title X regulations.

4. Column D includes additional state money in th form of matching funds which cannot be distilled from the other funds.

VERMONT

	(A) Total Women	(B) Women at or below 150% of poverty	(C) Title X Award
Planned Parenthood of Northern New England	11,650	6,443	$425,962
Vermont Department of Health			6,358
TOTALS	11,650	6,443	$432,320
			24.98%

NOTES:

1. Total number of women served (Column A) reflects 1989 figures. The balance of the Columns (C-G) reflect figures from fiscal year 1990.
2. Column B reflects the number of women in Column A whose incomes are at or below 150% of the federal poverty guidelines.
3. The total of Columns C-F reflects funds that are subject to Title X regulations.
4. Vermont agency statistics do not contain a breakdown of patients at or below 150% of poverty by gender. Since 98% of all Title X patients were women, we assume that 98% of those in poverty were women. *See* Column B.
5. Planned Parenthood of Northern New England receives the funds in Column C for services provided under contracts with the Vermont Department of Health.

(D) Non-Title X	(E) State Funds	(F) MCH Block	(G) Total Columns (C) - (F)
$1,040,940	$257,076	$ - 0 -	$1,723,978
		$ - 0 -	6,358
$1,040,940	$257,076	$- 0 -	$1,730,336
60.16%	14.86%		100%

6. Column D is the sum of patient fees: $923,044; Medicaid; $77,109; tuition/fees: $18,475; and miscellaneous agency funds: $22,312.

VIRGINIA

	(A)	(B)	(C)	(D)	(E)	(F)	(G)
	Total Women	Women at or below 150% of poverty	Title X Award	Non-Title X	State Funds	MCH Block	Total Columns (C) - (F)
Department of Health	82,704	68,644	$2,590,818	$556,160	$8,791,995	$1,749,907	$13,688,880
			18.93%	4.06%	64.23%	12.78%	100%

NOTES:

1. Total number of women served (Column A) reflects 1989 figures. The balance of the Columns (C-G) reflect figures from fiscal year 1991.

2. Column B reflects the number of women in Column A whose incomes are at or below 150% of the federal poverty guidelines.

3. The total of Columns C-F reflects funds that are subject to Title X regulations.

4. Column E includes local department of health funds because under Virginia Code Ann. §32.1-31 (1950) as amended, the local departments of health are state agencies.

(20) (19)

Nos. 89-1391 and 89-1392

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IN THE

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v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent,

THE STATE OF NEW YORK, *et al.*,
Petitioners,

v.

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On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF THE NATIONAL ASSOCIATION OF WOMEN LAWYERS AND THE NATIONAL CONFERENCE OF WOMEN'S BAR ASSOCIATIONS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

JAMES F. FITZPATRICK
Counsel of Record
L. HOPE O'KEEFFE
LAURENCE J. FREEDMAN

ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700

WALTER DELLINGER
DUKE LAW SCHOOL

Attorneys for Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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---

BRIEF OF THE NATIONAL ASSOCIATION OF WOMEN LAWYERS AND THE NATIONAL CONFERENCE OF WOMEN'S BAR ASSOCIATIONS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

With the consent of the parties, the National Association of Women Lawyers and the National Conference of Women's Bar Associations respectfully submit this brief as *amici curiae* in support of Petitioners.

INTEREST OF AMICI CURIAE

The National Association of Women Lawyers ("NAWL"), founded in 1890, is a voluntary national membership organization of the legal profession. Its

members include attorneys from every state and the District of Columbia, including prosecutors, public defenders, private attorneys, trial and appellate judges from the state and federal courts, legislators, law professors, and law students. NAWL has official representation in various national and international organizations and is an affiliate of the American Bar Association. As an organization made up primarily of women, NAWL has and continues to be a supporter of women's rights. As an organization of attorneys, NAWL supports the integrity of the justice system.

The National Conference of Women's Bar Associations ("NCWBA") is a nonprofit professional organization of state, regional, and local women's bar associations and includes associations in 37 states and the District of Columbia. The NCWBA was formed in 1981 to promote the highest standards of the legal profession, to advance justice, to promote and protect the interests of women, and to pursue these goals through appropriate legal, social, and political action.

The interest of the NAWL and the NCWBA in filing this brief as *amici curiae* is, above all, the preservation of First Amendment speech rights. By manipulating speech of Title X organizations to dictate what the government declares shall be orthodox, the regulations at issue in this case flagrantly contravene the spirit and letter of the First Amendment. As members of the legal profession, we have a special interest in protecting individual rights and liberties guaranteed by the First Amendment from the shifting tides of the political process.

The Title X restrictions upon free speech occur in a context that heightens the NAWL's and NCWBA's concerns. We are committed to protecting zealously the relationship of trust, consistent with professional obligations, between the learned professional and the client, who relies upon the professional's knowledge, expertise, and candor; these regulations threaten the integrity of this professional-client relationship. These concerns are amplified

by the disproportionate harm that the speech restrictions would cause to those persons who lack the funds to pay for private care; it is imperative that professionals providing direct professional services to indigent clients maintain their independence from political intervention.

SUMMARY OF ARGUMENT

The argument of *amici* supports the decision of the First Circuit sitting *en banc* in *Massachusetts* v. *Secretary of HHS* that the Title X regulations violate petitioners' First Amendment free speech rights. *Amici* argue that the Second Circuit concluded erroneously that these regulations are constitutionally sound.

Part I demonstrates that the Title X regulations challenged here are premised upon viewpoint and subject-matter discrimination in violation of the First Amendment. The regulations designedly distort physician-patient communications by dictating what must be said and what may not be said to a pregnant woman who turns to a partially Title X-funded facility for medical advice, regardless of her needs or interests and regardless of the physician's professional obligations. Moreover, they stifle the voice of one side of vital public debate on the abortion issue, directly gagging public support of access to abortion while leaving contrary, anti-abortion speech unfettered.

Part II refutes any contention that the regulations are a mere refusal to subsidize constitutionally protected speech rather than an unconstitutional condition. Part IIA shows that the regulations condition the right to receive Title X funds on an invidiously discriminatory, viewpoint-based requirement that every organization accepting such funds relinquish its right to core protected expression. Under controlling law, such a discriminatory condition could not stand even if it affected only federally funded activities.

Part IIB demonstrates that this unconstitutional condition extends far beyond the imposition of government-

endorsed medical doctrines on federally financed activities. The entire Title X project is required to adhere to the state-dictated position, no matter how small a proportion of the facility's funding derives from the government. Further, onerous requirements of separation between the Title X facility and any entity expressing the disfavored viewpoint deliberately block the participating organization's ability to use private channels to express its views. Such impositions upon independently funded protected speech are blatantly unconstitutional, and thus must be struck down.

ARGUMENT

I. THE TITLE X REGULATIONS VIOLATE FIRST AMENDMENT FREEDOM OF SPEECH RIGHTS BY REGULATING SPEECH ON THE BASIS OF VIEWPOINT, PROHIBITING SPEECH BASED ON ITS SUBJECT MATTER, AND INTERFERING WITH DOCTOR-PATIENT COMMUNICATIONS

A. The Title X Regulations Impose Viewpoint-Based Restrictions on Protected Speech in Violation of the First Amendment

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *United States* v. *Eichman*, 110 S. Ct. 2404, 2410 (1990) (quoting *Texas* v. *Johnson*, 109 S. Ct. 2533, 2544 (1989)). As the Supreme Court has repeatedly emphasized, the First Amendment forbids governmental efforts to suppress "dangerous ideas" by imposing viewpoint-specific speech restrictions.[1] *See Regan* v. *Taxation With Representation*, 461

[1] For example, this Court invalidated a statute prohibiting certain protests near embassies because the restriction "depends entirely upon whether their picket signs are critical of the foreign government or not." *Boos* v. *Barry*, 485 U.S. 312, 318-19 (1988) (O'Connor, J., joined by Stevens, J., and Scalia, J.); *see Police Dep't* v. *Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else the

U.S. 540, 548 (1983) (citing *Cammarano* v. *United States*, 358 U.S. 498, 513 (1959)). As Justice Stevens stated, "a regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues . . . is the purest example of a 'law . . . abridging the freedom of speech.'" *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 546 (1980) (Stevens, J., concurring). *Accord City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

The regulations impose glaring and unconstitutional viewpoint restrictions that control not only the communication between health care professionals and their clients in programs partially funded by Title X,[2] but also speech between organizations partially funded by Title X and the public.

1. *The Title X Regulations Discriminate Based on Viewpoint by Requiring Title X Doctors and Counselors To Communicate to Their Patients Prescribed Viewpoint-Specific Information and Prohibiting Them from Discussing Any Contrary Viewpoint*

A review of the Title X regulations at issue here confirms the First Circuit's determination that the regulations constitute a pure example of speech regulation that is "both viewpoint and content-based in violation of the first amendment." *Massachusetts* v. *Secretary of HHS*, 899 F.2d 53, 75 (1st Cir. 1990) (*en banc*).[3] No fair

First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

[2] Throughout the brief, employees in family planning programs that receive any Title X funds are referred to as "participating" health care professionals.

[3] In addition to the First Circuit, every other federal court that has reviewed these regulations, except the courts below, has determined that the Title X regulations are viewpoint-discriminatory. *West Virginia Ass'n of Community Health Centers* v. *Sullivan*,

reading could construe these regulations as viewpoint neutral.[4] It is simply impossible to conclude that "the regulations in question do not facially discriminate on the basis of the viewpoint of the speech involved." *New York* v. *Sullivan*, 889 F.2d 401, 414 (2d Cir. 1989). The critical fact is that the Second Circuit majority, over a sharp dissent, found it necessary to mischaracterize the regulations in order to sustain them. The Title X regulations restrict speech not only by compelling participating health care professionals to communicate one viewpoint, but also by prohibiting them from communicating to their clients information that expresses the other viewpoint.

a. *Compelled Speech*

The Title X regulations command and instruct participating health care professionals to inform and refer pregnant clients in the following manner.

First, participating health care professionals are instructed to inform a pregnant client—irrespective of her medical condition, the circumstances of her pregnancy, or her request for information—that abortion is not an "appropriate" response to her medical condition. Indeed, these professionals are instructed to state "that the proj-

—— F. Supp. ——, 1990 Westlaw 66552 (S.D.W. Va. March 1, 1990); *Planned Parenthood Fed'n* v. *Bowen*, 680 F. Supp. 1465, 1475 (D. Colo. 1988).

[4] Contrary to the Respondent's position, this is *not* a situation in which the government has decided simply to fund only preventive family planning services and to avoid any involvement with patients who seek assistance with a pregnancy. Respondent's Brief on Petition for Writ of Certiorari at 5, *New York* v. *Sullivan*, (Nos. 89-1391, 89-1392) (filed May 1990). Title X grantees are *not* instructed simply to inform pregnant clients that the program does not provide information or referrals for pregnant patients, as Respondent suggests. Rather, the regulations specifically direct Title X grantees to undertake to provide counseling and information to women who are pregnant, but to do so in a manner that restricts and distorts the information conveyed to those patients. *See* 42 C.F.R. § 59.8 (1988).

ect can help her to obtain prenatal care" and will provide her with a list of prenatal care providers. 42 C.F.R. § 59.8(b)(5) (1988) (example of acceptable response to inquiry regarding abortion information).

Second, participating doctors and counselors must provide their pregnant clients with "information necessary to protect the health of mother and *unborn child*," *id.* § 59.8(a)(2) (1988) (emphasis added), even if a client has indicated unequivocally her intent to terminate her pregnancy.

Third, participating professionals must give every pregnant client of their facility "a list of available providers that promote the welfare of mother and unborn child." *Id.* These professionals cannot exclude from this list any health care providers that "do not provide abortions." [5] *Id.* § 59.8(a)(3).

Compelled speech, such as these regulations command, plainly violates the First Amendment. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). *See Riley* v. *National Fed'n of Blind*, 487 U.S. 781, 795 (1988); *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977); *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977).

b. *Prohibited Speech*

The regulations compound the constitutional infirmity triggered by the forced speech by expressly prohibiting

[5] The participating program must include on the referral list every prenatal health care provider that does not principally provide abortions. *Compare* U.S. Dep't of Health and Human Services, *Program Guidelines for Project Grants for Family Planning Services* § 7.4 (1981) (granting programs discretion to select referral providers).

health professionals from communicating any information that expresses the contrary viewpoint. "[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley*, 487 U.S. at 797 (emphasis in original).

First, a participating professional *cannot refer* a client who seeks to terminate a pregnancy, irrespective of her medical circumstances,[6] to any other health care provider "whose principal business is the provision of abortions." 42 C.F.R. § 59.8(a)(3). Indeed, a participating organization may not even supply pregnant clients with a copy of the Yellow Pages. *See New York* v. *Sullivan*, 889 F.2d at 415 (Cardamone, J., concurring).

Second, participating professionals "may not provide counseling" concerning abortion to any pregnant client. 42 C.F.R. § 59.8(a)(1).

Third, the regulations prohibit participating professionals from "encouraging or promoting abortion," even with respect to pregnancy posing severe medical risks to the patient. 42 C.F.R. § 59.8(a)(3).

These blatantly viewpoint-specific prohibitions flatly contravene this Court's instruction in *Carey* v. *Population Services Internat'l*, 431 U.S. 678, 700 (1977), that the government "may not 'completely suppress the dissemination of concededly truthful information about entirely lawful activity'" (quoting *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 773 (1976)).

Thus, a straightforward review of the regulations themselves compels the conclusion that, contrary to the premise of the appellate court, the Title X regulations are undeniably viewpoint-restrictive. The majority's statement that "[a]rgumentation pro or con as to the advisability of an abortion for a particular woman is

[6] The regulations except a medical "emergency." 42 C.F.R. § 59.8.

neither required nor authorized," *New York* v. *Sullivan*, 889 F.2d at 414, simply cannot be squared with the regulations as a whole, nor with the regulations' explicit instruction that doctors inform a pregnant woman that "the project does not consider abortion an appropriate method of family planning." 42 C.F.R. § 59.8(b)(5).

2. *The Title X Regulations Prohibit Title X Grantees from Communicating a Particular Viewpoint Through Public Information, Political Expression, and Legal Advocacy*

The constitutional harm of outright censorship of doctor-patient communications is aggravated by the unconstitutional restraints imposed on participating family planning programs. The Title X regulations forbid grantees from expressing a particular viewpoint in the arenas of public information, political expression, and legal advocacy, types of speech that merit stringent First Amendment protection, while leaving expression of opposing viewpoints unrestricted.

First, the regulations prohibit participating organizations from "lobbying for the passage of legislation to increase in any way the availability of abortion." 42 C.F.R. § 59.10(a)(1). Yet, nothing in these regulations forbids Title X grantees from lobbying to *decrease* the availability of abortion.

Second, the regulations prohibit participating organizations from "[p]roviding speakers to promote the use of abortion." 42 C.F.R. § 59.10(a)(2). The regulations do not, however, prohibit Title X grantees from providing speakers who aim to *dissuade* pregnant clients from seeking an abortion.

Third, the regulations prohibit participating organizations from "[p]aying dues to any group that as a significant part of its activities advocates abortion." 42 C.F.R. § 59.10(a)(3). Title X grantees can, however, support groups that *oppose* abortion.

Fourth, the regulations prohibit participating organizations from "disseminating . . . materials . . . advocating abortion." 42 C.F.R. § 59.10(a)(5). Here again, however, Title X grantees can disseminate informational materials aimed at promoting *childbirth*.[7]

Finally, the regulations prohibit participating organizations from "[u]sing legal action to make abortion available in any way." 42 C.F.R. § 59.10(a)(4). Yet, Title X grantees are allowed to participate in legal activities the aim of which is to *minimize* the availability of abortion.

Subpart 59.10 is a blatant attempt to shrink the speech rights of partially Title X-funded organizations. Each of these naked viewpoint restrictions clearly violates the First Amendment prohibition on viewpoint restrictions upon speech. *See Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 505 (1981) (The First Amendment prohibits the suppression of "the dissemination of truthful information about an entirely lawful activity merely because [the government] is fearful of that information's effect upon its disseminators and its recipients."); *see also Martin* v. *Struthers*, 319 U.S. 141, 146-47 (1943). Their combined effect is to gag Title X grantees who wish to express supposedly "dangerous ideas."

Amici are particularly alarmed by the viewpoint-based restriction on partially Title X-funded organizations' right to take legal action. "The right to petition the courts cannot be so handicapped." *Brotherhood of R.R. Trainmen* v. *Virginia State Bar*, 377 U.S. 1, 7 (1964). *See United Transp. Union* v. *Michigan Bar*,

[7] These prohibitions, as interpreted by HHS, would force health care providers with Title X funds from maintaining libraries and written materials with indisputably neutral and accurate information regarding abortion, based on the government view that any information about abortion encourages it. *See* 53 Fed. Reg. 2922, 2923, 2933, 2943 (1988) (final regulations); 52 Fed. Reg. 33,211 (1987) (proposed regulations).

401 U.S. 576, 580-81 (1971); *NAACP* v. *Button*, 371 U.S. 415, 429 (1963). This restriction impedes access to the courts and effective advocacy within the judicial system. Indeed, if the regulations were in effect at this moment, no health care provider receiving any Title X funds would be able to participate in this judicial proceeding.

B. The Title X Regulations Violate the First Amendment by Prohibiting Speech Based on Subject Matter

The Title X regulations are blatant viewpoint-specific restrictions, contrary to the cursory—and erroneous—Second Circuit statements suggesting otherwise. But beyond that, the Title X regulations violate the First Amendment by singling out and proscribing speech on the highly controversial and politicized subject of abortion.

There is no question that prohibitions of speech based on subject matter, like restrictions based on viewpoint, violate the First Amendment guaranty of freedom of speech.[8] For example, in *Regan* v. *Time, Inc.*, 468 U.S. 641, 648-49 (1984), this Court admonished that "[r]egulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *See also Police Dep't*

[8] Suppression of speech regarding a particular subject will in some instances constitute viewpoint discrimination. In this case, a Title X patient who learns she is pregnant must choose between one of two inevitable alternatives—continued pregnancy and abortion. In this context, a subject-matter restriction (foreclosure of all abortion-related speech) is equivalent to a viewpoint-based restriction. However labeled, the regulations violate the First Amendment because they silence all speech that expresses the view that abortion is an option—and perhaps a medically advisable option—for a Title X patient. *See Bigelow* v. *Virginia*, 421 U.S. 809, 826 (1975) (citing *NAACP* v. *Button*, 371 U.S. at 429 (restrictions on speech are strictly scrutinized regardless of their "particular label")).

v. *Mosley*, 408 U.S. at 95. As the First Circuit stated, "[i]t is by now black letter law that [a subject-matter] restriction is a violation of the first amendment." *Massachusetts* v. *Secretary of HHS*, 899 F.2d at 75.

This Court reiterated its intolerance for subject-matter prohibitions on speech in *Arkansas Writers' Project* v. *Ragland*, 481 U.S. 221, 230 (1987). In that case, the Court struck down a tax scheme based on magazines' subject matter, emphasizing that "the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its *content*." *Id.* at 229 (emphasis in original). *See also Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to [restrictions on speech] extends not only to restrictions on certain viewpoints, but also to prohibition of . . . discussion of an entire topic."); *accord Metromedia, Inc.* v. *San Diego*, 453 U.S. at 515; *Carey* v. *Brown*, 447 U.S. 455, 460-61 (1980).

Thus, even if the Second Circuit were correct in its assertion that the Title X regulations prohibit discussions between participating professionals and patients about the entire topic of abortion, that is a subject-matter speech restriction in violation of the First Amendment.

C. The Title X Regulations Violate the First Amendment by Interfering with Doctor-Patient Communications

The federal courts have consistently reaffirmed that the "right of the doctor to advise his patients according to his best lights seems so obviously within First Amendment rights as to need no extended discussion." *Poe* v. *Ullman*, 367 U.S. 497, 513 (1961) (Douglas, J.) (dissenting from dismissal). *See Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965); *Massachusetts* v. *Secretary of HHS*, 899 F.2d at 73; *Reproductive Health Servs.* v. *Webster*, 851 F.2d 1071, 1078 (8th Cir. 1988), *issue declared moot on appeal*, 109 S. Ct. 3040 (1989); *Planned Parenthood v. Arizona*, 718 F.2d 938, 944 (9th Cir. 1983), 789 F.2d 1348 (9th Cir.) (affirming remand), *aff'd mem.*, 479 U.S. 925 (1986); *see also Bigelow* v. *Virginia*, 421 U.S. at 822 (recognizing First Amendment right to communicate information regarding medical services). This is especially true where, as here, the speech is necessary to effectuate the constitutional right to privacy.[9] *Massachusetts* v. *Secretary of HHS*, 899 F.2d at 73; *see Bigelow* v. *Virginia*, 421 U.S. at 822.

1. *The Regulations Violate the Physician's Right and Duty To Convey Information*

From a professional's perspective, the basic vice of the challenged regulations is that they obstruct a physician's First Amendment freedom, and professional responsibility, to convey essential medical information to a patient. *See Planned Parenthood Fed'n* v. *Bowen*, 680 F. Supp. at 1477.

Participating doctors are strictly forbidden from counseling patients about abortion, informing a pregnant woman about the availability of abortion, or even telling her where she can receive full abortion-related information. This prohibition applies irrespective of the client's medical condition (*e.g.*, drug addiction, AIDS, diabetes), the circumstances of pregnancy (*e.g.*, rape, incest), or the patient's direct requests for information.

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[9] Although it has been held that the government has a legitimate interest in favoring childbirth over abortion, and that this interest is sufficient to sustain a decision not to provide governmental funding for abortions, *see Harris* v. *McRae*, 448 U.S. 297 (1980) and *Maher* v. *Roe*, 432 U.S. 464 (1977), this Court has never suggested that the government's interest would constitute a compelling interest that would allow the direct abrogation of First Amendment rights. To hold otherwise would be tantamount to declaring childbirth an official state "orthodoxy," which is strictly forbidden by the Constitution. *See Texas* v. *Johnson*, 109 S. Ct. 2533 (1989); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943).

This prohibition against discussing abortion is compounded by 42 C.F.R. subpart 59.8(a)(2), which affirmatively compels a doctor to provide distorted information designed to promote the welfare of "mother" and "unborn child" even when the woman's condition renders this advice contrary to prevailing professional standards. This directly contravenes basic tenets of professional medical ethics and established medical care standards, which require physicians to disclose all medically reasonable available options. *See Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association* § 8.07 (1986); N.Y. Public Health Law § 2805-d(1) (McKinney 1985). In fact, a physician who fails to inform a patient of all treatment options and the associated risks may well be liable in tort for malpractice as a result. *See Canterbury* v. *Spence*, 464 F.2d 772, 781-83 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); *Smith* v. *Cote*, 128 N.H. 231, 513 A.2d 341 (1986).

The coercive combination of prohibition and compulsion creates a dilemma for the doctor: the choice between adherence to the Title X requirements or to the professional codes of ethics, and, correspondingly, between the risks of defunding, on one hand, or disciplinary action, potential tort liability, and, of course, risks to the patient's health or life, on the other.

2. *The Regulations Violate the Patient's Right To Receive Medical Information*

The challenged regulations also affect the patient's rights. This Court has long established that the right to receive information is the essential reciprocal of the right to convey information. *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976); *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972). This right specifically extends to information on contraception and abortion. *Bigelow* v. *Virginia*, 421 U.S. at 821-22 (1975); *Griswold* v. *Connecticut*, 381 U.S.

at 482 (1965); *see Planned Parenthood Fed'n* v. *Bowen*, 680 F. Supp. at 1477; *Planned Parenthood* v. *Fitzpatrick*, 401 F. Supp. 554, 577-78 (E.D. Pa. 1975), *aff'd mem. sub nom. Franklin* v. *Fitzpatrick*, 428 U.S. 901 (1976).

The right to receive information is especially critical in the context of indigent medical care. *See Virginia Pharmacy Bd.*, 425 U.S. at 763 (suppression of prescription drug price information hits the hardest on the poor, the sick, and the aged). In the particular case of the physician-patient relationship, incomplete and misleading information can be tantamount to fatal misinformation. When the patient is a poor woman, whose only access to health care is a clinic that receives federal funds, her dependence on the accuracy, reliability, and completeness of the medical advice rendered there is total.[10]. By preventing full disclosure of crucial information, these regulations thus endanger the health and lives of those who need it most.

Similarly, a paying patient's right to receive medical information is threatened. *Planned Parenthood Fed'n* v. *Bowen*, 680 F. Supp. at 1476; *see* 53 Fed. Reg. at 2931 (comments on final regulations) ("a significant percentage of the clients served by Title X projects are full-pay"). Like indigent women, these patients may turn for medical advice to a partially Title X-funded facility without any knowledge that they will receive a governmentally distorted flow of medical information.

In summary, these regulations directly intrude upon doctor-patient communications for reasons unrelated to —and indeed antithetical to—profesisonal standards and a patient's health interest. The First Amendment will not tolerate such interference with constitutionally protected speech.

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[10] Many Title X-funded clinics provide a unique service for their communities. *See New York* v. *Sullivan*, 899 F.2d at 415 (Cardamone, J., concurring).

II. THE TITLE X REGULATIONS IMPOSE UNCONSTITUTIONAL CONDITIONS ON THE AVAILABILITY OF A GOVERNMENT SUBSIDY

Although the government is under no constitutional obligation to fund or subsidize family planning activities, having done so, it cannot impose conditions that suppress or penalize constitutionally protected expression.[11] The Supreme Court has consistently rejected attempts by the government to condition a subsidy or benefit on the relinquishment by the recipient of a constitutional right:

> [E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny . . . the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. . . . Such interference with constitutional rights is impermissible.

Perry v. *Sindermann*, 408 U.S. 593, 597 (1972) (citations omitted). *See Sherbert* v. *Verner*, 374 U.S. at 404-05; *Speiser* v. *Randall*, 357 U.S. 513 (1958).

As Justice Scalia has noted, "[i]t is rudimentary that the State cannot exact as the price of [cash subsidies and other] special advantages the forfeiture of First Amendment rights." *Austin* v. *Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1408 (1990) (Scalia, J., dissenting). "It is too late in the day to doubt that the lib-

[11] This prohibition on conditional funding applies whether or not the restrictions are designed specifically to inhibit the exercise of speech rights. *Sherbert* v. *Verner*, 374 U.S. 398, 405 (1963). In this case, the effect of the regulations on speech is direct, explicit, and intentional.

ert[y] of . . . expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert* v. *Verner*, 374 U.S. at 404.

Likewise, the government cannot punish an existing recipient of funds for exercising the right to speech. *Perry* v. *Sindermann*, 408 U.S. at 597. Otherwise, the freedom of speech would "be penalized and inhibited," *id.*, which would allow the government indirectly to "produce a result which the State could not command directly." *Speiser* v. *Randall*, 357 U.S. at 526. This method of "interference with constitutional rights is impermissible." *Perry* v. *Sindermann*, 408 U.S. at 597. *See United States* v. *Robel*, 389 U.S. 258 (1967). *See generally* Rosenthal, *Conditional Spending and the Constitution*, 39 Stan. L. Rev. 1103 (1987); Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415 (1989).

The Title X regulations cross over the line between a permissible refusal to subsidize constitutionally protected activities and an unconstitutional condition on federal subsidies for two distinct reasons.[12] First, the regula-

[12] Although there is no right to specific types of federally funded health care *services*, *see Harris* v. *McRae*, 448 U.S. 297 (1980) and *Maher* v. *Roe*, 432 U.S. 464 (1977), patients have a right to unimpeded *access to information* from health care providers, even if the medical facility is partially federally funded. *See Webster* v. *Reproductive Health Servs.*, 109 S. Ct. 3040, 3060 (1989) (O'Connor, J., concurring) (leaving open for litigation the controversy that would arise if public funds were used to "prohibit publicly employed health professionals from giving specific medical advice to pregnant women"); *id.* at 3053-54 (plurality opinion); *see also Planned Parenthood* v. *Bowen*, 680 F. Supp. at 1475.

Moreover, under *Maher* and *McRae*, the government may fund childbirth provided it "places no governmental obstacle" to the patient's choice, *McRae*, 448 U.S. at 315, and the policy leaves a pregnant woman with the "same choices" as if the government did not provide any medical services, *Webster*, 109 S. Ct. at 3052. *See McRae*, 448 U.S. at 317. Even if they did not offend the First Amendment, the Title X regulations would run afoul of both of these prohibitions by mandating that doctors provide incomplete

tions invidiously discriminate to suppress dangerous ideas. Second, the regulations directly penalize the participating organizations for using independent funds to exercise rights of free speech.

A. The Conditions Placed on the Title X Subsidy Invidiously Discriminate in a Manner Designed To Suppress Dangerous Ideas

The Supreme Court has consistently invalidated allocation of governmental benefits based on the viewpoint or subject matter of the recipient's expression. Congress may not "discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.'" *Regan* v. *Taxation With Representation*, 461 U.S. 540, 548 (1983) (quoting *Cammarano* v. *United States*, 358 U.S. 498, 513 (1959)).[13]

Thus, in *Arkansas Writers' Project*, general-interest magazines were denied tax exemptions available to specialized publications. The Supreme Court found the provision unconstitutional, emphasizing that the "official scrutiny of the content of publications" required by the state was "entirely incompatible with the First Amendment's guarantee of freedom of the press." *Id.* at 229, 230.

While rejecting a content-based rule, the dissent in *Arkansas Writers'* acknowledged that subsidy programs

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and, in many cases, medically misleading information. Instead of no information, or medical advice in her best interest, the pregnant client of a Title X program is provided with the state view on childbirth, under the guise of independent medical judgment.

[13] In *Taxation With Representation*, the Court upheld a requirement that lobbying activities protected by the First Amendment be separated from other activities as a condition of tax deductibility. But the Court emphasized that the tax laws at issue did not discriminate on the basis of content and had neither the intent nor the effect of suppressing ideas. 461 U.S. at 548. The Court cautioned that the outcome "would be different" if the subsidies were discriminatory. *Id.*

can be "manipulated so as to" have a "significant coercive effect" over speech. 481 U.S. at 237 (Scalia, J., dissenting). In those cases "the courts will be available to provide relief." *Id.* The dissent suggested a "prophylactic rule . . . when the subsidy pertains to the expression of a particular *viewpoint* on a matter of political concern." *Id.* (emphasis added).

Similarly, in *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), the Court held that Congress could not condition the receipt of grants for public broadcasting with a ban on editorializing. The Court criticized the ban as "defined solely on the basis of the content of the suppressed speech" because "enforcement authorities must necessarily examine the content of the message that is conveyed." *Id.* at 383. Significantly, as here, the government sought to portray the regulation as a mere refusal to subsidize constitutional activity under the spending power, *see id.* at 399, but the Court rejected that approach.

The Title X regulations present this Court with precisely the invidious speech discrimination forewarned in *Regan* v. *Taxation With Representation* and condemned by both the majority and the dissent in *Arkansas Writers'*. Through their funding conditions, the regulations prohibit core protected speech—counseling, referral, pamphlets, lobbying, and legal action—on one side of a controversial social, medical, personal, and political issue, and require speech promoting the other viewpoint.

Likewise, the Title X regulations fail the test set forth in a case upholding the government's refusal to extend food stamp benefits to striking workers. In *Lyng* v. *United Automobile Workers*, 485 U.S. 360 (1988), the Court upheld the statute at issue on the grounds that it "requires no exaction from any individual; it does not 'coerce' belief; and it does not require [strikers] to . . . support political views with which they disagree." 485 U.S. at 369. Additionally, the statute in *Lyng*

fairly reflected the legitimate congressional policy of "maintaining neutrality in private labor disputes." *Id.* at 373.

In contrast, by silencing doctors as to abortion counseling and referral, prescribing the contents of a referral list, prohibiting on a viewpoint-specific basis legal and legislative advocacy, and instructing doctors to tell pregnant clients interested in abortion-related information that abortion is not "appropriate," the Title X regulations, taken as a whole, operate to exact, coerce, and impose state-sponsored political beliefs on Title X programs and their professional employees.

Also unlike *Lyng*, the Title X regulations do not reflect a neutral policy toward the recipients of federal benefits. In *Lyng*, striking workers would not lose existing benefits, but simply would not receive additional benefits. Here, Title X programs lose their Title X funds if they exercise the prohibited speech activity.

Finally, again in contrast to *Lyng*, the Title X regulations impact not only the rights of those receiving the federal subsidy, but also the rights of those who rely on the information. As noted above, many indigent clients are completely dependent on Title X clinics for vital medical knowledge, and will be unaware that the medical information they are receiving has been distorted by the government. In addition, many private paying patients will be unaware that the government has narrowed their medical options, or even that their health care provider receives some of its funds from the federal government.

B. The Title X Regulations Impermissibly Restrict and Penalize Independently Funded Speech

Beyond the fact that viewpoint-based conditions on Title X subsidies are unconstitutional, the regulations violate the First Amendment on separate grounds because they restrict protected speech funded by independent sources. *Massachusetts* v. *Secretary of HHS*, 899 F.2d

at 73-74. As the First Circuit observed, the "Second Circuit . . . ignored the fact that private money ('matching funds') is tied up and held hostage to the same restrictions as Title X funds because of the new definition of the 'Title X program' in the regulations." *Id.* at 71. The government may not use the promise of government funding as a means of, in effect, dictating how the private funds gathered by an organization will be used for protected speech. *FCC* v. *League of Women Voters*, 468 U.S. 364, 399-401 (1984); *see FEC* v. *Massachusetts Citizens for Life*, 479 U.S. 238, 255 (1986).

Prior decisions in the medical context have consistently applied this principle to strike down laws conditioning government subsidies on termination of privately funded speech activities. *Planned Parenthood* v. *Arizona*, 789 F.2d 1348; *West Virginia Ass'n of Community Health Centers* v. *Sullivan*, —— F. Supp. ——, 1990 Westlaw 66552, at 20 (S.D.W. Va. March 1, 1990); *Valley Family Planning* v. *North Dakota*, 489 F. Supp. 238, 242 (D.N.D. 1980), *aff'd*, 661 F.2d 99 (8th Cir. 1981).

The Title X regulations directly violate this principle. First, the regulations require that the organization devote privately raised funds to Title X projects *and* subject those private funds to the regulations. This guarantees that private funds will be burdened by these regulations. Second, the onerous requirements of separation between a Title X project and an organization's nonfunded activities discourage protected speech and unconstitutionally limit private expenditures.

1. *The Regulations' Imposition of Content Restrictions on Non-Federal Funds Unconstitutionally Restricts Independent Spending*

The unconstitutional impact of government regulations on private speech is described in *FCC* v. *League of Women Voters*. There, the Court emphasized that conditioning public broadcasting grants on a ban on editorial-

izing was invalid in part because it prevented local stations from underwriting editorializing with non-federal funds, so that "a noncommercial educational station that receives only 1% of its overall income from [federal] grants is barred absolutely from all editorializing . . . and, more importantly, it is barred from using even wholly private funds to finance its editorial activity." 468 U.S. at 400.

That these regulations govern use of private funds is incontrovertible. By definition, the regulations cover all activities of a Title X program regardless of the source of funds: "Title X project funds include all funds allocated to the Title X program, including but not limited to grant funds, *grant-related income* or *matching funds*." 42 C.F.R. § 59.2 (emphasis added).

Two types of private funds are necessarily implicated by this definitional scheme. First, every Title X program includes at least 10% of its budget from matching funds obtained from independent sources. *Massachusetts* v. *Secretary of HHS*, 899 F.2d at 73 n.11. In practice, the independent funds account for between 10 and 91 percent of Title X program funding, with an average of 50%. *Id.* Thus, it follows that, as the First Circuit found, "the regulations directly restrict the use of a significant amount of private money (the 10% or more that the private organizations spend within the Title X program)." *Id.* at 74. *See also West Virginia Ass'n*, 1990 Westlaw 66552, at 19-21 (rejecting view that the Title X regulations restrict only the use of public funds). This First Circuit conclusion is unchallengeable; the Title X program definition demands the inclusion of independent funds.

Second, the regulations affect the organizations' use of privately generated funds from patient fees.[14] Notably,

[14] The regulations define "grant-related income," which includes patient fees, as included in the definition of Title X funds subject to the regulations. 42 C.F.R. § 59.2.

the court below indicated that it was unclear on the record whether participating organizations provide care for private paying patients. *New York* v. *Sullivan*, 889 F.2d at 413-14. However, indisputably, private patients are clients of programs that use Title X funds, as HHS concedes and as two district courts have confirmed. 53 Fed. Reg. at 2931; *see Planned Parenthood Fed'n* v. *Bowen*, 680 F. Supp. at 1476; *West Virginia Ass'n*, 1990 Westlaw 66552, at 18.

Because of this inclusion of private matching funds and payments from private patients in their coverage, the regulations are invalid as unconsitutional conditions placed on the use of private funds by Title X fund recipients.

2. *The Requirement of Artifically Strict Separation Between Title X Projects and Other Activities Discourages Protected Speech*

Even if the Title X regulations did not mandate the use of independent funds, the regulations would still be unconstitutional due to the burden imposed on the use of private funds by the strict requirements of physical and administrative separation between Title X projects and the participating organizations' independent activities. A series of recent cases outlines the parameters under which the government may attach non-viewpoint-related conditions to government benefits where the conditions have the practical effect of "discourag[ing] protected speech." *FEC* v. *Massachusetts Citizens for Life*, 479 U.S. at 255; *FCC* v. *League of Women Voters*, 468 U.S. 364; *Regan* v. *Taxation With Representation*, 461 U.S. at 545. These cases examine the conditions on the subsidized activities in the light of the organizations' alternative means of exercising the same free speech rights through an affiliate or subsidiary. If "the avenue [that the statute or regulation] leaves open is more burdensome than the one it forecloses," the restriction is unconstitutional. *Massachusetts Citizens for Life*, 479 U.S. at 255.

For example, in *Taxation With Representation*, this Court addressed a regulation that it determined did not discourage protected speech. There, it upheld an IRS requirement that lobbying by tax-exempt organizations must be conducted by a separate "lobbying affiliate." 461 U.S. at 544-45 n.6. Crucial to this holding was the finding that "[t]he IRS apparently requires only that the two groups [the non-profit and its lobbying affiliate] be separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying." 461 U.S. at 544 n.6. Critically, the tax-exempt organization did not claim that this "dual structure" created *any* discouragement of speech or burden on speech. *Id.*

In contrast, in *FCC* v. *League of Women Voters*, the Court struck down a federal ban on editorializing by noncommercial educational television stations, in part because the ban penalized private, protected speech activity: the stations could not easily segregate speech-related activities by their source of funding. 468 U.S. at 399-401. Applying the *Taxation With Representation* framework, the Court reasoned that if Congress were to allow noncommercial educational stations to establish " 'affiliate' organizations which could then *use the station's facilities* to editorialize with nonfederal funds," then the First Amendment infirmities might be cured. *Id.* at 400 (emphasis added). But absent any such alternative, the restriction on the organization's free speech rights was unconstitutional.

Finally, in *Massachusetts Citizens for Life*, this Court invalidated provisions of federal election law requiring corporations to segregate funds used "in connection with" federal elections.[15] 479 U.S. at 241. The election law mandated changes in accounting and organizational

[15] The law did not apply to unincorporated associations. Thus, the benefits of incorporation were conditioned on the election law requirements.

structure, and imposed other minimal administrative costs. The Court found that the requirement that such activities be segregated in a separate organization unconstitutionally burdened the organization's First Amendment rights.[16] 478 U.S. at 263.

The Title X regulations far exceed the parameters set by this Court in these cases. They require an independently funded activity to be "physically and financially separate" from any of the defined "prohibited activities" and stress that "[m]ere bookkeeping separation of Title X funds from other monies is not sufficient." 42 C.F.R. § 59.9. To be sufficiently physically separate, the Title X facility must, to the government's satisfaction, have separate staff and separate treatment, consultation, examination, and waiting rooms. 42 C.F.R. § 59.10.

The First Circuit found that the separation requirements of the Title X regulations burdened First Amendment speech: "The practical effect of the regulations is to restrict significantly the ability of the recipient organization to engage in the forbidden counseling, even on its own time with its own money." *Massachusetts* v. *Secretary of HHS*, 899 F.2d at 74. Thus, the separation requirements force Title X programs to choose among significantly curtailing activities to achieve the required segregation, closing, and restricting the speech rights of doctors and patients. *Id.* at 75 n.13.

The Title X regulations require a segregation of funded and non-funded activities that is plainly more onerous than the administrative requirements upheld in *Taxation With Representation*, more burdensome than the administrative requirements invalidated in *Massa-*

[16] A plurality in *Massachusetts Citizens for Life* found an impermissible burden in the recordkeeping requirements, disclosure obligations, and solicitation limitations. *Id.* at 256-63. Justice O'Connor found the burden in the organizational restraints placed upon the organization by the state. *Id.* at 265-66 (O'Connor, J., concurring in part and concurring in judgment).

chusetts Citizens for Life, and at least as burdensome as the ban on editorializing invalidated in *League of Women Voters.*[17] They fall clearly on the *League of Women Voters-Massachusetts Citizens for Life* rather than the *Taxation With Representation* side of the line. The speech-impairing requirements of separation of subsidized and non-subsidized activities, far from rendering the restrictions on the subsidized activities constitutional, impermissibly and unconstitutionally penalize the non-subsidized, private activities, chilling protected speech in violation of the First Amendment.[18]

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[17] As the First Circuit specifically found, "this [separation] requirement is significantly more onerous that the purely paperwork requirements at issue in *Regan.*" 899 F.2d at 75 n.13. Significantly, the requirement struck down as unconstitutionally burdensome in *League of Women Voters*, like the Title X regulations, would have required stations to operate dual facilities in order to exercise their protected First Amendment rights. 468 U.S. at 399-401.

[18] The vague definitions of separation also burden independent speech. Separation determinations will be made on a "case by case" basis with four "non-exclusive factors" weighed. 53 Fed. Reg. at 2940. No "examples" of combinations of factors that would not be considered "separate" were given because such examples would be "misleading" given the "complex circumstances and conditions that the Department will be considering." *Id.*

When faced with a ban on unreasonable fundraising fees in *Riley*, this Court rejected such case-by-case rules where free speech might be chilled. 487 U.S. at 793-94. "Speakers . . . cannot be made to wait for years before being able to speak with a measure of security." *Id.* at 794. In every case, the fundraiser would "risk . . . a mistaken adverse finding by the factfinder, even if the fundraiser and the charity believe that the fee was in fact fair." *Id.* "This scheme must necessarily chill speech in direct contravention of the First Amendment dictates." *Id.*

Likewise, Title X grantees' speech with independent funds will be chilled by the poorly defined separation requirement as they are forced to go far beyond the requirements' dictates to avoid defunding.

CONCLUSION

The Title X regulations thus pose a grave challenge to fundamental First Amendment rights and to the central premise that the government cannot invidiously discriminate in its subsidies and cannot condition entitlement to benefits on the relinquishment of the right of free speech. Accordingly, the National Association of Women Lawyers and the National Conference of Women's Bar Associations urge this Court to reverse the decision below and strike down the regulations as unconstitutional.

Respectfully submitted,

JAMES F. FITZPATRICK *
Counsel of Record
L. HOPE O'KEEFFE
LAURENCE J. FREEDMAN

ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700

WALTER DELLINGER
DUKE LAW SCHOOL

Attorneys for Amici Curiae

July 27, 1990

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Supreme Court, U.S.
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(21) (20)

Nos. 89-1391, 89-1392

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DR. IRVING RUST, on behalf of himself, his patients, and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

THE STATE OF NEW YORK, THE CITY OF NEW YORK, THE NEW YORK CITY HEALTH & HOSPITALS CORP.,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS, THE CENTER FOR CONSTITUTIONAL RIGHTS,

(Amici continued on inside cover)

JAMES M. SHANNON
Attorney General of Massachusetts
RUTH A. BOURQUIN
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

DAVID D. COLE
(Counsel of Record)
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6464

BEST AVAILABLE COPY

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH
AMERICANS FOR DEMOCRATIC ACTION
AMERICAN JEWISH CONGRESS
THE AMERICAN VETERANS COMMITTEE, INC.
ARTICLE 19, INTERNATIONAL CENTRE ON CENSORSHIP
BOSTON WOMEN'S HEALTH BOOK COLLECTIVE
BUSINESS AND PROFESSIONAL WOMEN/USA
CATHOLICS FOR A FREE CHOICE
CATHOLICS FOR CHOICE OF ST. LOUIS
THE CENTER FOR WOMEN POLICY STUDIES
COALITION FOR CHOICE OF VALPARAISO SCHOOL OF LAW
D.C. RAPE CRISIS CENTER
THE DOMESTIC VIOLENCE CENTER OF CHESTER COUNTY
FEDERATION OF RECONSTRUCTIONIST CONGREGATIONS AND HAVUROT
FLORIDA ASSOCIATION FOR WOMEN LAWYERS, DADE CHAPTER, INC.
THE FUND FOR FREE EXPRESSION
THE GAY MEN'S HEALTH CRISIS
HADASSAH
HAWAII WOMEN LAWYERS
HOLLYWOOD WOMEN'S POLITICAL COMMITTEE
INSTITUTE OF WOMEN TODAY
THE JEWISH LABOR COMMITTEE
JOURNAL OF WOMEN'S HISTORY
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
LAWYERS FOR REPRODUCTIVE RIGHTS
LEARNING ALLIANCE
NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC.
NATIONAL COALITION OF AMERICAN NUNS
NATIONAL CONFERENCE OF BLACK LAWYERS
THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE
NATIONAL GAY RIGHTS ADVOCATES
NEW YORK WOMEN IN CRIMINAL JUSTICE
OAKHURST PRESBYTERIAN CHURCH (GEORGIA)
THE ORGANIZATION FOR BLACK STRUGGLE
P.E.N. AMERICAN CENTER
POPULATION COMMUNICATION
THE POPULATION COUNCIL
POPULATION CRISIS COMMITTEE
PRO-CHOICE NETWORK OF WESTERN NEW YORK, INC.
PRO-CHOICE RESOURCES
REFUSE AND RESIST!
THE RELIGIOUS COALITION FOR ABORTION RIGHTS
SOUTHERN STUDENTS FOR CHOICE
THE SOUTHWEST COALITION FOR CHOICE
TARRANT COUNTY, TEXAS CHOICE NETWORK
TRANSNATIONAL FAMILY RESEARCH INSTITUTE
THE UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA
UNITED STATES STUDENT ASSOCIATION
WOMEN EMPLOYED
WASHINGTON WOMEN UNITED
WOMEN'S ALLIANCE THEOLOGY, ETHICS AND RITUAL
WOMEN'S AMERICAN ORT
THE WOMEN'S LAW CENTER, INC.
WOMEN LAWYERS' ASSOCIATION OF LOS ANGELES
WOMEN LAWYERS' ASSOCIATION OF MICHIGAN
WOMEN'S MEDICAL FUND, INC.

AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE

Amici curiae, the Commonwealth of Massachusetts and 57 organizations, share a common commitment to safeguarding fundamental First Amendment freedoms.[1] This brief focuses on the First Amendment issues presented by this case, and on the implications for a free marketplace of ideas if the government is permitted to enforce the regulations challenged here.[2]

Counsel for amici—the Center for Constitutional Rights and the Attorney General of Massachusetts—were counsel for plaintiffs in *Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53 (1st Cir. 1990) (*en banc*), *petition for cert. filed*, No. 89-1929 (June 11, 1990), which resulted in a nationwide injunction against the regulations at issue here.

STATEMENT OF THE CASE

A. Statement Of Facts

Title X of the Public Health Services Act, 42 U.S.C. § 300 *et seq.* (1982), was enacted in 1970 as the Family Planning Services and Population Research Act (hereinafter "Title X"). Title X is designed to provide a comprehensive program of family planning services for the "over five million American women [who] are denied access to modern, effective, medically safe family planning services due to financial need." 116 Cong. Rec. S24,093 (1970) (Statement of Sen. Yarborough).[3]

While Title X clinics may not provide abortions, 42 U.S.C. § 300a-6, for nearly twenty years the government interpreted

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1 Individual descriptions of the amici are set forth in the appendix.

2 The Commonwealth of Massachusetts endorses the arguments set forth in the Amici Brief of the Attorneys General of Ohio and several other states filed in this action.

3 *See* Pub. L. No. 91-572, § 2 (1970). *See also* H. R. Rep. No. 1472, 91st Cong. 2d Sess. 4, *reprinted in* 1970 U.S. Code Cong. and Admin. News 5068; H.R. Conf. Rep. No. 1567, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 5080-82.

Title X to allow non-directive counseling about and referral for abortions where health care professionals deemed such counseling or referral appropriate, and indeed, in some situations, to require it.[4] During this twenty-year period, Congress repeatedly rejected attempts to amend Title X to prohibit abortion-related counseling and referrals.

On February 2, 1988, the Secretary of Health and Human Services sought to accomplish through regulation what Congress had refused to do through legislation: to prohibit non-directive counseling and referral by barring all information about abortion. He promulgated regulations that: (1) prohibit a Title X program from counseling about or making referrals for abortions, even where the health care provider believes such counseling and referral is medically indicated, 42 C.F.R. § 59.8(a)(1); (2) require Title X recipients to provide a pregnant woman with "a list of available providers that promote the welfare of mother and unborn child," and "information necessary to protect the health of the mother and unborn child until . . . the referral appointment is kept," 42 C.F.R. § 59.8(a)(2); and (3) bar Title X recipients from "encourag[ing], promot[ing], or advocat[ing] abortion as a method of family planning," while imposing no restrictions on anti-abortion advocacy. 42 C.F.R. § 59.10.[5] Thus, receipt of Title X funds is conditioned on the medical counselor providing a woman with information designed to protect the life of the "unborn child" and refraining from offering any information about the availability or appropriateness of abortion.

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4 Non-directive counseling includes informing the patient that abortion and childbirth are her options, and providing information about the relative risks of abortion and childbirth in her particular case. *See, e.g.*, Affidavit of Drisgula at ¶¶ 8,20 (Joint Appendix ("JA") 150, 154); Affidavit of Murray at ¶¶ 11-14 (JA 236-37); Affidavit of Sammons at ¶ 6 (JA 262-63); United States Dept. of HEW, Program Guidelines for Project Grant for Family Planning Services (Jan. 1976) (JA 51); Memorandum from Office of the General Counsel, Dept. of HEW (April 14, 1978) (JA 56-57).

5 Counsel for the Secretary represented that this provision bars Title X clinics even from providing the Yellow Pages to a client, since it lists abortion facilities. *See New York v. Sullivan*, 889 F.2d 401, 417 (2d Cir. 1989) (Kearse, J., dissenting); *id.* at 415 (Cardamone, J., concurring).

These restrictions apply not only to the federal grant funds actually appropriated by Congress, but to "all funds allocated to the Title X program, including but not limited to, grant funds, grant-related income or matching funds." 42 C.F.R. § 59.2. Hence, if a provider is to receive federal Title X monies, it may not use funds generated for that project through paying patients or other non-federal sources to support counseling about or referrals for abortions, or for any other activities that may have the effect of assisting or encouraging abortion.

In addition, the regulations require not only financial but also *physical* separation of the Title X program from activities deemed prohibited by §§ 59.8 and 59.10. 42 C.F.R. § 59.9. Thus, under the regulations, even if a grantee can demonstrate that its federal funds are being used solely for Title X-approved activities, it must also physically separate its Title X project from other services provided with non-federal monies.

B. Procedural History

The regulations at issue here were challenged in four separate lawsuits across the country. In the case currently before the Court, the district court for the Southern District of New York dismissed the action, and the court of appeals affirmed, over Judge Amalya Kearse's dissent. *New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988), *aff'd*, *New York v. Sullivan*, 889 F.2d 401. The Second Circuit found the regulations consistent with the Title X statute, and found no constitutional infirmities.

In the three other lawsuits, district courts for the District of Massachusetts, the District of Colorado, and the District of West Virginia invalidated all or a portion of the regulations on statutory and constitutional grounds. *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988); *Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465 (D. Colo. 1988), 687 F. Supp. 540 (D. Colo 1988), *appeal pending*, No. 88-2251 (10th Cir. argued May 11, 1989); *West Vir-*

ginia Association of Community Health Centers, Inc. v. Sullivan, No. 2:89-0330 (D.W.Va. Mar. 1, 1990).

In *Massachusetts v. Bowen*, the district court entered a nationwide injunction, holding the regulations violative of privacy rights and the First Amendment. 679 F. Supp. 137. That decision was affirmed by a panel of the Court of Appeals for the First Circuit. *Massachusetts v. Secretary of Health and Human Services*, No. 88-1279 (1st Cir. May 8, 1989). The First Circuit granted rehearing *en banc*, and on March 19, 1990, the *en banc* court affirmed the injunction. *Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53 (1st Cir. 1990) (*en banc*). The court found the expanded definition of project funds inconsistent with the Title X statute, and held that the remainder of the regulations violated plaintiffs' privacy and First Amendment rights.

SUMMARY OF ARGUMENT

The regulations challenged in this case are unprecedented in the annals of public medicine. Never before has the federal government sought to support a medical counseling program in which physicians are forbidden from providing full information to patients concerning available options for treating a medical condition. It is virtually unthinkable that the government would establish such a program in any other medical context; one cannot imagine, for example, a government-funded cancer counseling program in which physicians are barred from giving referrals for or even discussing chemotherapy as one option for treatment.

The regulations directly dictate the message that Title X grantees must impart on a subject of public controversy. They forbid counseling or referrals about abortion, while requiring counseling and referrals directed toward preserving the health of the "unborn child." 42 C.F.R. § 59.8. They forbid advocacy in favor of abortion, while permitting anti-abortion advocacy. 42 C.F.R. § 59.10. And they instruct Title X counselors, if asked specifically about abortion, to say that it is not "an appropriate method of family planning." 42 C.F.R. § 59.8(b)(5). In short, they transform what was historically a neutral family planning counseling program into a mechanism for providing one-sided information skewed to the Administration's particular political viewpoint on abortion.

The regulations' central flaw under the First Amendment can best be demonstrated by imagining the same sort of regulations drafted by a government that favored abortion over childbirth.[6] It is doubtful that the Administration would find permissible as a First Amendment matter a Title X program that mandated counseling and referrals *only* about abortion, barred counseling about maintaining the health of the "unborn child," and instructed counselors when asked about childbirth to say that it is not "appropriate." The First Amendment would forbid such a program for the same reason that it forbids the current regulations: both violate the fundamental requirement of government neutrality.

The regulations violate the principle of neutrality in two ways. First, they are unconstitutionally viewpoint-based, because they have the purpose and effect of suppressing speech of one viewpoint, speech about the option of abortion, while mandating speech about the other option, childbirth. While the government may have somewhat wider latitude in the context of subsidies than where it absolutely prohibits speech, that latitude does not free it from the First Amendment mandate of viewpoint neutrality.

Second, the regulations draw content-based lines that are impermissible in a counseling context. Because a counseling relationship is especially conducive to influence and coercion, a heightened degree of government neutrality is mandated here: the government may not impose content-based restrictions that preclude the provision of information relevant to the decision whether to bear a child. Thus, once the government decides to provide post-pregnancy counseling and refer-

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6 In a world beset by overcrowding, this is by no means a wholly speculative possibility. In China, for example, government officials adopted far more extreme measures to "encourage" no more than one child per family. L. Tribe, *Abortion: The Clash of Absolutes* 62-63 (1990).

ral, as it has here, it may not suppress relevant information about abortion or childbirth.

The regulations also violate the First Amendment because their restrictions extend beyond the government's own funds, and place conditions on the clinics' ability to speak on the topic of abortion with their own resources. Through their matching-fund and separation requirements, the regulations effectively penalize grantees who use private monies to counsel about, refer for, or encourage abortion.

That the Secretary of Health and Human Services would impose such unparalleled restrictions on family planning counseling only underscores the political sensitivity of the abortion issue. But precisely because abortion is at once an extremely controversial political subject and an important personal decision, the government must not be permitted either to suppress expression about abortion, or to inculcate unsuspecting women with its particular political preferences by providing one-sided counseling slanted towards the government's point of view.

ARGUMENT

I. THE REGULATIONS VIOLATE THE FIRST AMENDMENT BECAUSE THEY ARE DESIGNED TO SUPPRESS EXPRESSION OF THE IDEA THAT ABORTION IS AN OPTION

The principle of viewpoint neutrality is central to the First Amendment tradition. It applies not only to criminal prohibitions but also to the allocation of subsidies, and is designed to ensure that the government does not use its institutional advantage to monopolize or impermissibly influence the marketplace of ideas. Thus, the Secretary correctly conceded in the First Circuit that "[t]he fact that grant conditions define the scope or extent of the government's subsidy does not insulate the conditions from constitutional challenge" where the regulations are " 'aim[ed] at the suppression of dangerous ideas.' " Appellant's Supplemental Brief in *Massachusetts v. Secretary of Health and Human Services*, No. 88-1279 (1st Cir. Brief filed Sept. 18, 1989) (hereinafter "Sec. Supp. Br.") at 18 (*quoting Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983) (*quoting Cammarano v. United States*, 358 U.S. 498, 513 (1959)).

The regulations challenged here are designed to suppress a particular idea that the Administration considers "dangerous"—that abortion is an option. Accordingly, they are unconstitutionally viewpoint-based.

A. The Regulations Are Viewpoint-Based

Under the challenged regulations, a woman who learns in a Title X clinic that she is pregnant may not be counseled about the option of abortion, but must be counseled on how to protect the health of her "unborn child." 42 C.F.R. § 59.8(a)(2). She must be offered a referral list of prenatal care providers "that promote the welfare of mother and unborn child," a list which may not include any facility that principally provides abortions. 42 C.F.R. § 59.8(a)(3).[7] If she specifically asks about abortion, she is to be told that "the project does not consider abortion an appropriate method of family planning," but can "help her to obtain prenatal care and necessary social services." 42 C.F.R. § 59.8(b)(5). Even if in the best judgment of her physician she should consider having an abortion (because, for example, she has extremely high blood pressure or AIDS), she may not be given even basic information about abortion or a referral to an abortion counselor.

There is no question that these regulations are designed to suppress a particular idea of which the government disapproves. Indeed, the Secretary admits that they are intended to send the "message . . . that the federal government does not sanction abortion." Preamble, 53 Fed. Reg. 2944 (1988); *id.* at 2943 (regulations "exhibit a bias in favor of childbirth and against abortion"). As the First Circuit found, the regula-

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7 For the most part, the only abortion providers that do not principally provide abortion are hospitals, which are often inaccessible for poor women. *See* Affidavit of Gordon at ¶¶ 13-14 (JA 180-84); Affidavit of Drisgula at ¶ 28 (JA 156); Declaration of Henshaw at ¶ 12 (JA 192).

tions "slant the content of the relevant counseling in an 'anti-abortion' direction." *Massachusetts v. Secretary of Health and Human Services*, 899 F.2d at 73.

The Secretary argued in the First Circuit that the regulations were promulgated to limit Title X to "preventive family planning," *i.e.*, counseling and services *prior to* conception. Sec. Supp. Br., *supra* at 1. That argument is belied by the regulations themselves. While the regulations specifically prohibit counseling about abortion, they do not forbid counseling or referrals on *any* other medical issue that might arise in a post-pregnancy counseling context. Thus, if a woman comes into a Title X clinic to receive the results of her pregnancy test and it becomes apparent that she needs information about any other medical treatment, her physician is permitted to counsel or refer her concerning that treatment. Of all the post-pregnancy subjects that might arise, *only* speech about abortion is suppressed.

Instead of neutrally barring all post-pregnancy counseling, the regulations single out for suppression, through enforced silence and affirmative discouragement, only one of the two post-pregnancy options. A neutral limitation of Title X to "preventive family planning" would not mandate one-sided counseling or biased referral lists. Neutral regulations would be equally responsive to women who ask about abortion or childbirth. Under the Secretary's regulations, however, only the patient who asks about childbirth receives responsive information and an appropriate referral. The woman who asks about abortion receives no information about abortion, is told that abortion "is not an appropriate method of family planning," and is offered a referral for prenatal care. *Compare* § 59.8(b)(1) *with* § 59.8(b)(5).

Moreover, if the government were neutrally attempting to restrict Title X to "preventive family planning," it would forbid projects to "encourage, promote, or advocate" not only abortion, but also childbirth (and, presumably, innumerable other topics). § 59.10. Yet it chose to bar only pro-abortion advocacy.[8]

The Second Circuit nonetheless found the regulations viewpoint-neutral. It concluded that because no "[a]rgumentation pro or con as to the advisability of an abortion" is required or authorized, "[t]he woman is thus under no pressure as a result of the regulations to accept or reject the services offered." *New York v. Sullivan*, 889 F.2d 401, 414 (2d Cir. 1989).

To suggest that a counselee will not be affected by one-sided counseling and referral is to ignore the realities of a counseling relationship. *See* Section I.C.1, *infra*. Nor is "argumentation pro or con" a necessary component of viewpoint suppression. Under the Second Circuit's rationale, a voter counseling program that provided information only about Republican candidates and barred discussion of Democratic candidates would be "viewpoint-neutral" as long as it did not require or authorize argumentation.

A regulation is viewpoint-neutral only when it " 'does not favor either side of a political controversy,' " *Boos v. Barry*, 485 U.S. 312, 319 (1988) (*quoting Consolidated Edison Co.*

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8 As the First Circuit correctly noted, appellate counsel's *post hoc* assurance that § 59.10 is not viewpoint-based because it prohibits *all* advocacy concerning abortion, pro or con, is "factually untenable" on the face of the regulations. *Massachusetts*, 899 F.2d at 75. In addition to the biased substantive language of § 59.10(a), every example of prohibited advocacy in § 59.10(b) concerns *pro*-abortion activity. *Id.* (citing regulations). Indeed, the regulations admit that "§ 59.10, like the remainder of the rules below, does exhibit a bias in favor of childbirth and against abortion." Preamble, 53 Fed. Reg. at 2943.

" 'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.' " *FTC v. Sperry and Hutchinson Co.*, 405 U.S. 233, 246 (1972) (*quoting Investment Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971)). Even agency members lack authority to effect *post hoc* emendations of written regulations under challenge in the courts. *Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1177 n.3 (2d Cir. 1977) ("no particular weight to be given to an administrative interpretation of a regulation 'made after [the] controversy had arisen' ") (*quoting Fleming v. Van Der Loo*, 160 F.2d 906, 912 (D.C. Cir. 1947)); *American Iron and Steel Inst. v. EPA*, 568 F.2d 284, 296-97 (3d Cir. 1977).

v. Public Service Commission, 447 U.S. 530, 537 (1980)), and does not "regulat[e] speech in ways that favor some viewpoints or ideas at the expense of others." *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). Here, the Secretary has admitted what is evident on the face of the regulations: they "exhibit a bias in favor of childbirth and against abortion." 53 Fed. Reg. at 2943. The provision of one-sided information and referral in counseling toward a decision that by definition involves a choice between two options cannot be said to be viewpoint-neutral without robbing that term of all meaning.

In addition to the face of a regulation, the Court looks to the government's underlying interest in determining whether a regulation is neutral as to the content or viewpoint of expression. *See, e.g., United States v. Eichman*, 58 U.S.L.W. 4744, 4745 (U.S. June 11, 1990) ("Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is 'related to the suppression of expression' ") (original emphasis); *Boos v. Barry*, 485 U.S. at 320 (neutral statute must be " '*justified* without reference to the content of the regulated speech' ") (original emphasis) (*quoting Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

Here, the only stated and indeed conceivable government interest is to suppress expression about abortion. Once the government decides to fund counseling and referral about any post-pregnancy options, it does not save money by permitting only one-sided counseling and referral. A neutral referral list does not cost any more than a biased one, nor is a neutral conversation about options more costly than a one-sided conversation. Thus, the *only* interest the government has in forbidding counseling about abortion is its ideological disapproval of that idea, and that interest is presumptively illegitimate. "There are some purported interests—such as a desire to suppress support for . . . an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas—that are so plainly illegitimate that

they would immediately invalidate the rule." *Taxpayers for Vincent*, 466 U.S. at 804.

B. The First Amendment Requires at a Minimum that Government Conditions on Allocation of Resources or Funding be Viewpoint-Neutral

Were the government to prohibit all family planning counselors from counseling about or advocating abortion, while compelling them to counsel about the care of the "unborn child," there is no dispute that its regulations would impose an unconstitutional viewpoint-based restraint on the freedom of expression.[9] The fact that the restrictions attach to government funding does not render them any less viewpoint-based.

The question this case raises therefore is whether the government may achieve indirectly, through a funding condition, what it is constitutionally forbidden from doing directly.[10] The Second Circuit held that it may, because so long as the restrictions can be characterized as a " 'decision not to subsidize the exercise of a fundamental right,' " they " 'do[ ] not infringe the right.' " 889 F.2d at 412 (*quoting Regan v. Taxation With Representation*, 461 U.S. at 549).

But this statement of the law is true only in a very limited sense, not applicable here. It is true that the Constitution does not generally impose affirmative requirements on the government to subsidize the exercise of constitutional rights. *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3052 (1989); *Regan*, 461 U.S. at 549. It is equally well-established, however, that in the absence of a compelling state interest, the First Amendment restricts the government's

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9 *See, e.g., Bigelow v. Virginia*, 421 U.S. 809 (1975) (statute prohibiting publications encouraging abortion violates First Amendment); *Schacht v. United States*, 398 U.S. 58, 63 (1970) (striking down viewpoint-based regulation governing wearing of military uniforms); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633-34 (1943) (government cannot require affirmation of government-sponsored message through flag salute in public schools).

10 *See Speiser v. Randall*, 357 U.S. 513, 526 (1958) (First Amendment prohibits government from indirectly "produc[ing] a result which [it] could not command directly").

ability to *selectively* subsidize speech on one side of a controversial issue. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Regan*, 461 U.S at 548.

Thus, if the government supported no counseling at all, plaintiffs could not argue that they have a constitutional right to have the government provide such services. Here, however, the government has chosen to subsidize some counseling, but only on one side of an inherently two-sided issue. The Court has consistently held that once the government chooses to support some expression in a particular forum, it must at a minimum maintain neutrality vis-a-vis the viewpoint of the speech.

As the Secretary conceded, the government may not discriminate in the provision of subsidies in such a way as to " 'aim[ ] at the suppression of dangerous ideas.' " *Regan*, 461 U.S. at 548 (*quoting Cammarano*, 358 U.S. at 513). Thus, where the government chooses to support some speech, it cannot avoid First Amendment scrutiny by maintaining that it is "merely" declining to subsidize other speech. Indeed, the Court rejected precisely that argument in *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, a First Amendment challenge to a subsidy program that offered a tax exemption to religious, professional, trade, and sports magazines, but not to general interest magazines. The dissenters in *Ragland* argued, as the Second Circuit held in this case, that because the government was not prohibiting any expression, but merely declining to subsidize particular types of magazines, its actions did not infringe the First Amendment. 481 U.S. at 236 (Scalia, J., dissenting). The majority rejected that position, however, and held that because the statute selectively subsidized speech based on content, it was unconstitutional under the First Amendment absent a compelling state interest. 481 U.S. at 230.[11]

11 Even the dissenters in *Ragland* agreed that stringent First Amendment scrutiny is appropriate "when the subsidy pertains to the expression of a particular viewpoint on a matter of political concern—a tax exemption, for example, that is expressly available only to publications that take a particular point of view on a controversial issue." *Ragland*, 481 U.S. at 237 (Scalia, J., dissenting); *see also Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946) (construing statute governing allocation of second-class mailing privileges, "a form of subsidy," to prohibit judgments based on the quality of the publications' content, because to allow such judgments would authorize impermissible censorship).

The principles articulated in *Regan* and *Ragland* are particular applications of a general mandate of government neutrality in the support of speech. The Court set forth the general rule most clearly in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), which challenged an ordinance that allowed access to public property for labor picketing but not other picketing. The Court held the ordinance unconstitutional because it failed to maintain strict neutrality:

> government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas' and government must afford all points of view an equal opportunity to be heard.

Mosley, 408 U.S. at 96.[12]

12 *Mosley*, like other public forum cases, concerns the extent to which the First Amendment limits the government's selective support of expression through access to its property. These cases uniformly mandate viewpoint neutrality, even where the government has not opened property to public expression. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (in non-public forum, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"); *see also id.* at 833 (1985) (Stevens, J., concurring) (even in a non-public forum, "[e]veryone on the Court agrees that the exclusion . . . is prohibited by the First Amendment if it is motivated by a bias against the views of the excluded groups"); *United States Postal Service v. Council of Greenburgh Civic Association*, 453 U.S. 114, 132 (1981) (in context of denial of access to non-public forum letterboxes, "if a governmental regulation is based on the context of the speech or the message, that action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's view' ").

Under the Second Circuit's approach in this case, the Chicago Police Department in *Mosley* could have avoided the dictates of the First Amendment by arguing that it was merely declining to subsidize (through access to public property) certain forms of picketing, and that picketers were free to picket elsewhere. But the Court ruled that the government must remain neutral in choosing which picketers to support, and struck down the ordinance because it failed to respect that neutrality.

To require neutrality in government support of speech is *not* to recognize an affirmative right to have one's speech subsidized. Rather, it is simply to enforce the " 'equality of status in the field of ideas' " that the Court recognized in *Mosley*. 408 U.S. at 96. There is no affirmative requirement that the government subsidize the press, but once it chooses to do so it must not discriminate based on the content of particular media. *Ragland*, 481 U.S. 221. And while the government need not establish or support public universities or libraries at all, once it decides to do so it may not base its determination of which books to maintain,[13] which teachers to employ,[14] or which student groups to support,[15] on the basis of whether government officials approve of their particular political views.

Similarly here, amici do not suggest that the government is affirmatively required to provide women with information regarding their post-pregnancy reproductive options. But once the government decides to fund a counseling relationship in which some such information is to be provided, it may not seek to skew the relationship by denying funding to those who would provide information about abortion, an idea of which it disapproves.

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13 *Board of Education v. Pico*, 457 U.S. 853, 871 (1982) (plurality) (government may not remove books from a publicly-funded school library if it does so in order to "deny [students] access to ideas with which the [school board] disagreed").

14 *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (state may not forbid teachers from advocating overthrow of government).

15 *Widmar v. Vincent*, 454 U.S. 263, 267-70 (1980); *Healy v. James*, 408 U.S. 169 (1972).

If the government were constitutionally permitted to maintain the one-sided subsidy of speech it proposes here, it would follow that the government could subsidize only those newspapers which advocate the Administration's views on abortion or foreign policy, only those plays which do not mention abortion, only those radio programs which reflect positively on the United States, or only those libraries whose books are consistent with the government's views on matters of public controversy. In each case, the journalist, playwright, broadcaster, or librarian denied funding would be met with the explanation that the government was not prohibiting its speech, but merely declining to subsidize it. Yet in each case, the very real effect of the government's program would be to skew the marketplace of ideas to its particular political predilections. And therefore, in each case, as here, the First Amendment demands that if the government chooses to support expression, it must do so in a neutral manner.[16]

C. The Regulations Draw Content-Based Lines That are Impermissible in the Counseling Context

Even under the Second Circuit's erroneous conclusion that the regulations are viewpoint-neutral, the regulations must nonetheless be subjected to strict First Amendment scrutiny because they draw impermissible content-based lines. When the government supports a counseling program, it may not impose restrictions on the communication of information relevant to the decision being counseled upon, whether or not those restrictions are viewpoint-based. Once it decides to sup-

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16 The Second Circuit relied on this Court's decisions providing that the government may make "a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds." *Maher v. Roe*, 432 U.S. 464, 474 (1977). But because of the First Amendment's neutrality principle, this holding cannot be simplistically transferred to the area of selective support of expression. For example, while the government certainly may implement its preference for Republican policies over Democratic ones by allocating public funds to *non-speech* programs, it may not establish a forum or provide subsidies designed to support *expression* on Republican policies while suppressing or excluding *expression* on Democratic policies.

port some post-pregnancy counseling, it may not draw content-based lines that prohibit counselors from providing relevant information on legally available options.[17]

This heightened requirement of neutrality derives from: (1) the nature of the counseling relationship; (2) the effect of providing only partial information on a woman's privacy rights; and (3) the controversial nature of the subject matter.

1. The Character of the Counseling Relationship Heightens the Need for Neutrality

The counseling relationship demands neutrality because of its extremely influential, and indeed potentially coercive, character. A counseling relationship is by definition a relation of dependence; the counselee relies upon the counselor for

17 The extent of neutrality that the First Amendment requires where the government chooses to fund or support speech varies according to the particular context. While *viewpoint* neutrality is always required absent a compelling interest, in some subsidy contexts a greater degree of neutrality is required. In traditional public forums (*Mosley*) and in subsidization of the press (*Ragland*), for example, the First Amendment demands strict *content* neutrality. *See also Bullfrog Films, Inc. v. Wick*, 847 F.2d 502 (9th Cir. 1988) (striking down as impermissibly content-based federal regulations basing films' eligibility for tax benefits on their political content).

Where the government supports speech in the public university, *Widmar v. Vincent*, 454 U.S. at 267 n.5; *Keyishian*, 385 U.S. at 603; and where the government chooses to subsidize speech by "expressly dedicat[ing a particular forum] to speech activities," it may draw some content-based lines, but other content lines are impermissible. *United States v. Kokinda*, 58 U.S.L.W. 5013, 5015 (U.S. June 27, 1990) (plurality); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983); *Cornelius*, 473 U.S. at 800-03 (plurality). Thus, a limited public forum may be created "for discussion of certain subjects," but within the forum, no further content-based lines are permissible absent a compelling interest. *Perry Education Assn.*, 460 U.S. at 46 n.7. Similarly, a state may generally decide which subjects will be taught in state schools, but may not forbid its teachers from mentioning particular theories, ideas, or subjects. *Keyishian*, 385 U.S. at 601-03; *Epperson v. Arkansas*, 393 U.S. 97, 115-16 (1968) (Stewart, J., concurring in the result); *cf. Tinker v. Des Moines Community School District*, 393 U.S. 503, 511 (1969) ("students may not be regarded as closed-circuit recipients of only that which the state chooses to communicate"); *see also* Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 Tex. L. Rev. 863, 876-78 (1979).

guidance about her options. In recognition of this fact, medical ethics and the doctrine of informed consent require medical counselors to provide their patients with full information on the available options.[18] This recognition is by no means limited to the abortion context, but underlies all ethical norms governing counseling, whether medical, legal, academic, or psychological.[19] Moreover, the counselee is essentially a " 'captive audience,' " thus increasing the danger of improper intrusion and influence. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (*quoting Public Utilities Commission v. Pollack*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting)).[20]

Thus, it is one thing for the government to express its opposition to abortion through political speeches. But it is another matter entirely to set up a one-on-one counseling relationship under the neutral rubric of "family planning," and then use that relationship to steer women, through the suppression of full information, to a particular government-desired outcome. The counseling context presents a substantial risk of impermissible influence, and therefore makes government neutrality all the more crucial. *Cf. Zauderer v.*

18 Medical ethics require physicians to provide full, unbiased counseling and referral about all available medical alternatives, whether or not the physician can provide them herself. Affidavit of Sammons ¶ 3 (JA 261-62); Declaration of Morley ¶¶ 18, 19 (JA 229-30); Declaration of Katz ¶ 9-11 (JA 207-09). Legal obligations in most states similarly mandate the provision of complete information. *See, e.g.*, Affidavit of Randolph ¶ 3 (JA 241); Affidavit of Gesche ¶ 15 (JA 15). This Court recently recognized the significance of informed consent in our common law, and its intimate relationship to constitutional freedoms. *Cruzan v. Director, Missouri Dept. of Health*, 58 U.S.L.W. 4916, 4920 (U.S. June 25, 1990).

19 *See, e.g.*, Rules 1.4, 2.1, Model Rules of Professional Conduct (1983) (requiring lawyer to provide client with sufficiently complete information to permit client to make informed decision on his or her options).

20 *See* Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 Tex. L. Rev. at 885 (explaining Court's decisions concerning First Amendment rights in public schools as predicated on "a constitutional policy limiting the state's power to communicate to a captive audience"); *id.* at 902 ("captive audience" considerations central to determining constitutionality of government expression).

Office of Disciplinary Counsel, 471 U.S. 626, 641-42 (1985) (recognizing potentially "coercive force" of one-to-one communication with attorney).

The Title X counseling relationship is especially conducive to coercion because the program is designed to reach indigent women.[21] Such women are not likely to have the means to go elsewhere. Affidavit of Coombs at ¶ 11 (JA 145). Even if they technically could afford to go elsewhere in the absence of a federally-funded program, they are likely to rely on the government's subsidized program in the interests of conserving their limited resources. Thus, the government has not only chosen an especially influential mechanism to promote its political preference for childbirth, but it has chosen to apply it to those least likely to have access to alternative sources of information. *Massachusetts*, 899 F.2d at 73 ("Given the educational and social handicaps of the women who depend upon Title X clinics, they may not learn much about the 'pro/anti abortion' considerations elsewhere; and in any event, they are likely to attach special importance to what a doctor tells them at a family planning clinic.").[22]

The nature of the Title X counseling relationship has particular relevance for the First Amendment inquiry because it directly and intimately threatens a woman's freedom to make one of the most important life and health decisions she will ever face. One of the principal aims of the First Amendment is to ensure that individuals are able to choose their own des-

21 Eighty percent or more of the patients at Title X clinics have incomes below 150 percent of the poverty line. Forrest, *Delivery of Family Planning Services in the United States*, 20 Fam. Plan. Persp. 88, 92 (1988); Declaration of Henshaw at ¶ 18 (JA 194); Affidavit of Gesche at ¶ 6 (JA 171); Affidavit of Coombs at ¶¶ 10-11 (JA 142-45); Affidavit of Drisgula at ¶ 7 (JA 150); Declaration of Fink at ¶ 3 (JA 160); Affidavit of Murray at ¶ 6 (JA 235); Affidavit of Randolph at ¶ 7 (JA 243); Declaration of Rust at ¶ 5 (JA 249-50).

22 The regulations harm not only those with no resources, but also those who pay for their Title X services. As the First Circuit recognized, "because most Title X clients pay a portion of the cost of the services (based on a sliding scale), the client's ability to go elsewhere has been significantly diminished because she has already paid what she could afford to the Title X clinic." *Massachusetts*, 899 F.2d at 70.

tinies free of the government's ideological intrusion.[23] The Title X program strikes at the core of that freedom.

The requirement of government neutrality here would apply in any counseling context, and does not depend upon the fact that the decision whether to have an abortion is itself constitutionally protected, although that fact certainly buttresses the requirement. *See* Section I.C.2, *infra*. The First Amendment would be infringed by any state-sponsored counseling program designed to provide information only about alternatives the government politically supports, while suppressing information about other legal options of which the government disapproves. Thus, the government could not bar federally-funded legal services lawyers from telling their clients about the option of divorce or providing referrals for divorce because the Administration disapproves of it.[24] Nor would the First Amendment permit a public university to establish a career counseling program in which counselors were required to provide information about careers in business, but forbidden from offering information about jobs in

23 *See West Virginia State Board of Education v. Barnette*, 319 U.S. at 642 (striking down compulsory flag salute statute to protect "the sphere of intellect and spirit which it is the purpose of the First Amendment to reserve from all official control"); *Police Department of Chicago v. Mosley*, 408 U.S. at 96 (First Amendment designed "to assure self-fulfillment for each individual"); *see also* Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591 (1982) (protecting "self-realization" is central purpose of First Amendment); T. Emerson, *The System of Freedom of Expression* 6 (1970) (First Amendment safeguards "individual self-fulfillment"); Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 Iowa L. Rev. 1, 3 (1976) ("[T]he values supported or functions performed by protected speech result from that speech being a manifestation of individual freedom and choice"); Scanlon, *A Theory of Freedom of Expression* 1 Phil. & Pub. Aff. 204 (1972) (First Amendment protects "autonomy").

24 Legal services attorneys are forbidden from providing certain types of legal services, 42 U.S.C. § 2996f(b), just as Title X clinics are forbidden from providing abortions. 42 U.S.C. § 300a-6. But the analogy here would be a provision barring legal services lawyers from providing basic information and referrals about those services that they could not themselves provide.

consumer protection. *See, e.g., Searcey v. Crim*, 815 F.2d 1389 (11th Cir. 1987).

The First Amendment requires neutrality in government subsidies in part because government attempts to instill orthodoxy in its citizens are anathema to a free society:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.

Barnette, 319 U.S. at 642; *see also Keyishian v. Board of Regents*, 385 U.S. at 603 (First Amendment "does not tolerate laws that cast a pall of orthodoxy over the [publicly funded] classroom"); *Pico*, 457 U.S. at 870 (same). The mandate of neutrality seeks "to avoid the insidious evils of government propaganda favoring particular points of view." *FCC v. League of Women Voters*, 468 U.S. 364, 409 (1983) (Stevens, J., dissenting).[25]

If upheld, the Title X restrictions would institute a propaganda outlet in one of the most intimate and influential contexts a citizen ever encounters—medical counseling. Indeed, it would give new and ominous meaning to the word "counseling." The government would be free to maintain a program that "counsels" millions of poor women by providing them with skewed information about their lawful reproductive choices. This is a particularly insidious form of propaganda, because it works by keeping women ignorant of their full

25 Recognizing these preeminent First Amendment values, Congress in creating the Corporation for Public Broadcasting sought to protect publicly funded broadcasting stations from all "governmental interference and control." *FCC v. League of Women Voters*, 468 U.S. at 369; *see also id.* at 386-87. Both the Senate and House Reports stated in the strongest possible terms that although government funding of non-commercial broadcasting was necessary, it must be structured so that political officials would have no control or interference over the content of programming. *See FCC v. League of Women Voters*, 468 U.S. at 386 n.17 (quoting from Senate and House Reports). These legislative decisions reflect a deep consensus in our society that government propaganda poses a grave threat to the free marketplace of ideas.

options, telling them only about the government's preferred choice.[26]

Thus, because the government has decided to support some post-pregnancy counseling and referral, the First Amendment bars it from suppressing the provision of information on abortion, information clearly relevant to the decision at hand.

2. The Effect On the Counselee's Privacy Rights of Providing One-Sided Counseling Also Supports a Mandate of Neutrality

The fact that the decision at issue—whether or not to bear a child—is itself independently constitutionally protected underscores the necessity for full information. The privacy right to abortion is in large part a decisional right, and therefore the First Amendment's guarantees are augmented here by the Title X patient's right to privacy.[27] The Constitution protects a woman's right "to decide to have an abortion and to effectuate that decision 'free of interference by the state.' " *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 429-30 (1983). A decision whether or not to terminate a pregnancy, like any decision concerning a medical procedure, is not free unless founded on full and unbiased information. *See supra* note 18. Therefore, the government may not seek to skew a pregnant woman's choice by requiring "the delivery of information 'designed to influence

26 Because patients' First Amendment rights are directly violated by a government program designed to steer them, through skewed counseling, away from the option of abortion, these regulations would be unconstitutional even if the government itself were operating the Title X program. The fact that the government has chosen to fund others to do so exacerbates rather than mitigates the constitutional violation. *See* Section II, *infra*.

27 As Justice Scalia recently noted, writing for the plurality in *Employment Division v. Smith*, 58 U.S.L.W. 4433, 4436 (U.S. April 17, 1990), where First Amendment protections and other constitutional guarantees operate "in conjunction," heightened protection is warranted. *See also Wooley v. Maynard*, 430 U.S. 705 (1977) (free speech and free exercise rights); *Bigelow v. Virginia*, 421 U.S. 809 (First Amendment and privacy rights); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (First Amendment and Fourteenth Amendment rights).

the woman's informed choice between abortion or childbirth.' " *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 760 (1986) (*quoting City of Akron*, 462 U.S. at 443-44).

As the First Circuit recognized, the regulations "attempt[ ] to persuade a woman to opt for childbirth over abortion by presenting limited and biased information and by rendering the decision to abort more difficult." *Massachusetts*, 899 F.2d at 66. For this reason, the regulations independently violate women's privacy rights. *Id.* at 64-72. But this fact also has an impact on the First Amendment analysis, for it underscores the necessity for government neutrality. *Id.* at 73.

The Secretary has argued that the regulations do not implicate any privacy rights because they create no obstacles to the abortion decision, and simply fail to remove pre-existing obstacles. *See Massachusetts*, 899 F.2d at 68-69. This argument is contrary to the unrebutted record evidence, which demonstrates that the establishment of a biased and one-sided counseling relationship erects affirmative obstacles to a woman's freedom to choose, by at best delaying her obtaining of abortion counseling, and at worst inducing her to rely on the partial information.[28]

The Secretary's argument regarding the absence of obstacles might have more credence had he sought to abolish the Title X program altogether. In the absence of any federally-funded family planning program, the Secretary might well argue that there is no affirmative right to subsidized information. But the government has not decided to get out of family planning altogether. Instead, it has decided to restructure family planning so that it provides one-sided, biased information. Far from playing a neutral hands-off role, the government has decided to enter the field of providing information

28 Affidavit of Drisgula at ¶¶ 20-22, 29 (JA 154-55, 57); Declaration of Fink at ¶ 12 (JA 163-65); Affidavit of Gesche at ¶¶ 16-20 (JA 164-66); Affidavit of Gordon at ¶¶ 6-14 (JA 181-84); Declaration of Henshaw at ¶¶ 15, 21 (JA 193, 195-96); Affidavit of Joseph at ¶ 9 (JA 203-04); Declaration of Morley at ¶¶ 6, 8, 12, 13 (JA 224-27); Declaration of Rust at ¶¶ 9-10 (JA 250-52); *see also Massachusetts*, 899 F.2d at 67, 69-70.

about post-pregnancy options, and to do so in a biased way that suppresses information and creates obstacles to a woman's right to decide whether to terminate her pregnancy.

Before the Second Circuit, the Secretary admitted that a system of subsidies that leads to the provision of "misleading or inaccurate information concerning abortion" would constitute an unconstitutional "obstacle." Appellee's Brief in *New York v. Sullivan* (2d Cir.) at 64 n.51. Yet in the context of medical counseling, where non-directive counseling about all available options is necessary to a patient's free choice, partial and one-sided information has the same effect as "misleading or inaccurate information." *Massachusetts*, 899 F.2d at 69-70.

Accordingly, because the information that the government has undertaken to suppress has a direct impact on women's constitutional right to decide whether to have an abortion, the First Amendment's mandate of neutrality is doubly mandated.

3. The Controversial Nature of the Topic of Abortion Underscores the Necessity for Neutrality

The political controversy surrounding the particular idea suppressed by the Title X regulations—that abortion is an option—also bolsters the need for neutrality. The Court has frequently acknowledged that the specter of censorship is most severe where the government seeks to regulate controversial speech, and therefore even viewpoint-neutral attempts to suppress controversial speech are unconstitutional. *FCC v. League of Women Voters*, 468 U.S. at 381 (striking down ban on editorializing by broadcasting stations receiving federal funding); *Consolidated Edison Co. v. Public Service Commn*, 447 U.S. at 533 (striking down order forbidding public utilities from using bill inserts to discuss "controversial issues of public policy"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) ("expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values' ") (*quoting Carey v. Brown*, 447 U.S. 455, 467 (1980)).

The Court's special vigilance for controversial and political speech stems in part from the First Amendment's role in protecting the democratic processes of self-government.[29] If as a society we are to make free and democratic choices about such controversial topics as abortion, the government must not be permitted to suppress information and manipulate speech about abortion through its purse strings. Indeed, if § 59.10 is constitutional, there would be nothing to stop the federal government, if it became unhappy with state legislation on the abortion issue, from subsidizing anti-abortion lobbying and not pro-abortion lobbying.

While reproductive choice is ultimately an intensely private decision, it is also undeniably the single most controversial issue in today's political climate. This fact makes it all the more important that the Court demand neutrality in government-supported expression on the topic.

II. THE REGULATIONS IMPERMISSIBLY PENALIZE GRANTEES' USE OF PRIVATE MONIES TO EXPRESS CONSTITUTIONALLY PROTECTED IDEAS

The regulations not only restrict government-funded expression, but also burden grantees' freedom to speak with private and non-federal monies. They do this in two ways: (1) by defining the "Title X project funds" restricted by the regulations to include non-federal monies; and (2) by imposing an onerous physical separation requirement on those clinics which seek to continue to counsel about abortions.

A. The Restrictions By Their Terms Apply to Non-Federal Funds

By expanding the definition of "Title X project funds," the regulations restrict all speech paid for with "grant funds, grant-related income or matching funds." 42 C.F.R. § 59.2.

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29 "The principle of the freedom of speech springs from the necessities of self government . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage." A. Meiklejohn, *Political Freedom* 27 (1960).

The Secretary admits that the regulations apply to all private "funds generated by the Title X project through, for example, patient charges or reimbursement from collateral sources." Brief for the Respondent on Petitions for Writ of Certiorari at 6 n.6. Thus, grant recipients are not free even to use their private monies to fund any abortion-related dialogue in the Title X project, and are compelled to use private funds to spread the government's ideological message. As the First Circuit stated, "The practical effect of the regulations is to restrict significantly the ability of the recipient organization to engage in the forbidden counseling even on its own time with its own money." *Massachusetts*, 899 F.2d at 74.[30]

Accordingly, the regulations do not merely limit how federal funds will be spent, but also impose affirmative conditions on grantees' use of funds generated privately and through the states. Such a restriction on a grant recipient's ability to speak freely with its own resources is an unconstitutional penalty. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *see also Rutan v. Republican Party of Illinois*, 58 U.S.L.W. 4872, 4875 (June 21, 1990); *Elrod v. Burns*, 427 U.S. 347, 355 (1976) (plurality); *id.* at 375 (Stewart, J., concurring in judgment).

In their extension to speech with non-federal funds, these regulations are analogous to the statute struck down in *FCC v. League of Women Voters*, 468 U.S. 364, which prohibited broadcasting stations receiving federal funds from endorsing candidates or "editorializing," even with their own monies.

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30 While Title X grantees are required by the Act to contribute ten percent (10%) of total expenses in matching funds, *see* 42 U.S.C. § 300a-4, "in fact, 'matching funds' comprise a much larger portion of the budget than the required 10%." *Massachusetts*, 899 F.2d at 55-56; *see also Valley Family Planning v. North Dakota*, 661 F.2d 99, 100 (8th Cir. 1981) (Title X funds only 33% of budget). Indeed, the Secretary conceded at oral argument before the First Circuit "that federal government funds account for about 50% of the money received by Title X clinics." *Massachusetts*, 899 F.2d at 56. The remainder is money "provided through state payments such as Medicaid, fees paid by the clients (based on a sliding scale) and private funds." *Id.*

The Court held this provision unconstitutional because it extended beyond a restriction on government funds to penalize private funds, and therefore chilled and censored protected speech. *Id.* at 400. The regulations here are even more constitutionally offensive, because they dictate not only what may *not* be said, but also what Title X providers *must* say with non-federal funds. *Wooley v. Maynard*, 430 U.S. 705 (1977) (unconstitutional to compel citizens to bear license plate with government slogan); *Barnette*, 319 U.S. at 633-34 (compulsory flag salutes unconstitutional).

B. The Physical Separation Requirement is Facially Unconstitutional Because It Burdens Speech With Private Funds

The Title X regulations require grantees to demonstrate physical separation of the Title X program from non-Title X activities, even if a grantee can demonstrate through financial separation that no federal funds are being spent for non-Title X activities. 42 C.F.R. § 59.9. This requirement is facially unconstitutional because it impermissibly burdens Title X grantees' privately-funded speech.

This Court has held that the government may impose a content-and viewpoint-neutral restriction on federally funded expression if it permits the grantee, through an affiliate, to spend its private monies on unrestricted expression. *Regan*, 461 U.S. at 544 n.6. In order to ensure unrestricted expression, however, separation requirements between the grantee and its affiliate are permissible solely to "show that tax-deductible contributions are not used to pay for [the restricted activity]." *Id.* This is because the government's interest in restricting use of its own funds "may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama*, 377 U.S. 288, 307 (1964). Anything beyond a requirement of financial separation, therefore, is facially unconstitutional.

In *Regan*, for example, the only requirements were that the affiliate be separately incorporated and keep records adequate to show financial separation. 461 U.S. at 544 n.6.[31] Similarly, in *FCC v. League of Women Voters*, the Court suggested in dicta that the editorializing ban might have survived if financial separation were an option, but made clear that *physical* separation should not be required. 468 U.S. at 400 (under Court's proposed separation, station would be able to "use the station's *facilities* to editorialize," so long as it did not use earmarked federal funds).

More recently, the Court struck down a separation requirement because it placed an undue burden on a corporation's private expenditures on expression. In *FEC v. Massachusetts Citizens for Life*, 107 S. Ct. 616, 625-27 (1986), the Court found separation requirements imposed on an ideological non-profit corporation's campaign spending so burdensome as to inhibit independent campaign expenditures, and invalidated them under the First Amendment.

The regulations on their face demand more than financial separation, and therefore are unconstitutional. They require physical separation as well, and would preclude Title X projects from establishing affiliates that could share Title X premises at a pro-rated rent and receive referrals from the Title X project. The physical separation requirement, particularly when coupled with the expanded definition of Title X funds to cover private and state as well as federal monies, goes far beyond that which is necessary to ensure that federal

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31 Moreover, *Regan* involved not a direct subsidy or tax exemption for an organization, but a restriction on the use of funds that were tax deductible by the organization's donors. Tax deductible funds are distinguishable from direct subsidies or exemptions on very practical grounds. Because the extent of any deduction will vary with each individual donor's tax bracket and financial circumstances, it would be practically impossible for the donee organization to ascertain how much of each donation was federally funded through the tax deduction, and how much was comprised of private funds. Thus, even if heightened scrutiny had been applied in *Regan*, the restrictions may well have survived; one of the narrowest means by which the government could prevent the use of deductible monies for lobbying was to restrict the use of the deductible donation in its entirety. No such practical difficulty is posed by a direct subsidy, the use of which can be limited without restricting any private funds. *See Massachusetts*, 899 F.2d at 74.

monies are not spent for a purpose outside the scope of its funded program. *See* Section III, *infra*.

This Court has repeatedly stated that the First Amendment will not "allow the government to 'produce a result which [it] could not command directly.' " *Perry v. Sindermann*, 408 U.S. at 597 (*quoting Speiser v. Randall*, 357 U.S. at 526). Here, the government could not directly prohibit the discussion of abortion as a method of family planning nor require private citizens to deliver the government's chosen message; it likewise cannot impose such requirements on Title X providers as a condition of receiving federal funds. Because the regulations impermissibly place Title X recipients in the position of choosing between exercising their free speech rights and foregoing federal funding, or censoring their speech and obtaining the government benefit, they violate the First Amendment.[32]

III. THE TITLE X REGULATIONS ARE NOT NARROWLY TAILORED TO SERVE A COMPELLING STATE INTEREST

Because the regulations impermissibly discriminate on the basis of the viewpoint and content of speech, and impose restrictive conditions on speech with private resources, they can be justified only if they are narrowly tailored to achieve a compelling state interest. *Ragland*, 481 U.S. at 231; *Barnette*, 319 U.S. at 633-34. The Secretary has not even claimed that the government has a compelling interest here, and has simply argued for a more lenient standard of review.

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32 Indeed, since the government cannot prevent the exercise of free speech rights by its direct employees acting on the government's time and money, *see Rankin v. McPherson*, 483 U.S. 378 (1987) (state may not discharge employee for exercise of free speech during work hours), it similarly may not impose restrictions on what non-federal employees receiving federal monies may express with other resources. As the First Circuit stated, it "would seem to follow *a fortiori*" from the government employee speech cases "[t]hat the government cannot restrict privately financed, unusually important, speech activities simply to achieve an ironclad guarantee that its funds are not 'improperly spent.' " *Massachusetts*, 899 F.2d at 74.

The only interest the government has asserted is "making certain its own money is not spent for a purpose outside the scope of its funded program," *i.e.*, "preventive family planning." *Massachusetts*, 899 F.2d at 74; Sec. Supp. Br., *supra* at 1. But as with most content- or viewpoint-based regulations, a less restrictive alternative is available in a neutral and more narrowly tailored prohibition. The Secretary could have provided for *no* counseling at all regarding post-pregnancy options. Alternatively, the regulations could have permitted the counselor to state that the options are abortion and childbirth, to inform the woman that no post-pregnancy counseling can be done in the Title X program, and to refer her to a neutral list of clinics that counsel and provide such services. And the regulations could have forbidden all advocacy, not just advocacy in favor of abortion.[33]

Similarly, a more narrowly tailored alternative is available with respect to the government's interest in ensuring that federal funds are not spent for inappropriate purposes. The Secretary could have limited the regulations' restrictions to the federal monies appropriated, rather than including in their ambit funds from private and state sources. And the Secretary could have required a demonstration of financial separation, without superimposing the additional requirement of physical separation.[34]

Thus, the Secretary has asserted no compelling state interest whatsoever, and the only interest he has asserted can be fully satisfied through a neutral and less restrictive alternative.

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33 In other contexts, the government might have a compelling interest in preserving the health of its citizens that might justify a non-neutral counseling program, such as an anti-alcoholism program. Even there, however, the government would have no compelling interest in *forbidding* its counselors from providing relevant information counter to its particular point of view, such as studies that demonstrate that drinking in moderation is not harmful.

34 As the First Circuit stated, "The government could easily withdraw the 'physically separate' facilities requirement, make the 'counseling' regulations less slanted, and provide various forms of 'bookkeeping' rules. These 'less restrictive alternatives' would be as likely to prove effective here as in *League of Women Voters*." *Massachusetts*, 899 F.2d at 74.

CONCLUSION

The current Administration clearly feels very strongly about the issue of abortion. It is free to make those views known through all manner of government speech, and it has done so. But the First Amendment limits its ability to intrude on indigent women's most personal decisions through a one-sided counseling program. The Administration is not free to manipulate its support of a "family planning" counseling program in a manner designed to suppress information about abortion and steer unsuspecting women toward its political preferences. "One's right to life, liberty, . . . free speech, . . . and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." *Barnette*, 319 U.S. at 638. For all the above reasons, the decision of the court of appeals should be reversed, and the regulations should be invalidated as unconstitutional.

Respectfully submitted,

DAVID D. COLE
(*Counsel of Record*)
Center for Constitutional Rights
666 Broadway—7th Floor
New York, New York 10012
(212) 614-6432

JAMES M. SHANNON
Attorney General of Massachusetts

RUTH A. BOURQUIN
Assistant Attorney General
One Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-2200

APPENDIX

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH (ADL), for over seventy-seven years, has pursued the objective set out in its Charter "to secure justice and fair treatment to all citizens alike." In order to further this objective, ADL has fought steadfastly to remove barriers which have prevented individuals from fully enjoying the rights guaranteed by the Constitution, including free speech, freedom of religion and equal protection.

AMERICANS FOR DEMOCRATIC ACTION (ADA), a liberal, independent political organization, is a national organization of civil rights and feminist leaders, academicians, business people, trade unionists, grassroots activists, elected officials, church leaders, professionals, Members of Congress and many others. ADA is dedicated to the achievement of freedom, equality of opportunity, economic security and peace for all people through education and political action.

AMERICAN JEWISH CONGRESS is an organization of American Jews founded in 1918 to protect the civil, political and economic rights of American Jews. It believes that government may not interfere with a woman's right to choose abortion.

THE AMERICAN VETERANS COMMITTEE, INC. (AVC), founded in 1943, is a national organization of veterans who served honorably in the Armed Forces of the United States in World War I, World War II, Korean War, or Vietnam War. AVC has filed *amicus* briefs in many court cases expressing AVC's strong belief that discrimination based on race, color, religion, sex, or national origin is detrimental to our nation. AVC believes that the U.S. Constitution entitles a pregnant woman, in light of her unique burden of pregnancy, to determine whether to terminate her pregnancy, and that the regulations under Title X of the Public Health Service Act involved in this case violate both that constitutional right and the right of medical personnel under the First Amendment to provide information about such termination to their patients.

ARTICLE 19, INTERNATIONAL CENTRE ON CENSORSHIP, an international human rights organization based in London, was established in 1986 to help promote and protect the rights proclaimed in Article 19 of the Universal Declaration of Human Rights. Those rights include the right to "seek, receive and impart information and ideas of all kinds, regardless of the frontiers". That clause, part of customary international law and thus binding on all governments, compels respect for the right of women to seek and receive even-handed information about abortion as well as for the right of physicians and others to impart such information. It is Article 19's position that the US Government, by denying federal aid to agencies that provide abortion information, is limiting those rights impermissibly.

BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, incorporated in 1972, is a non-profit educational organization devoted to women and health. We provide information, resources and technical assistance to the media, health care workers, policy makers, students, women's organizations in the U.S. as well as in other countries, and individuals with particular concerns. We serve about 10,000 persons every year. We are deeply concerned about this case because high quality, accessible family planning and abortion services are crucial to the health and well-being of women and their families.

BUSINESS AND PROFESSIONAL WOMEN/USA was founded in 1919 to improve the status of women in the workforce and is dedicated to promoting full participation, equity, and economic self-sufficiency for working women through active involvement of its 120,000 members in 3100 local chapters, joined together by 53 state federations and the national headquarters in Washington, D.C.

CATHOLICS FOR A FREE CHOICE is an independent national membership organization established in 1974. One of CFFC's objectives is to protect the legal right of all women and girls to act as moral agents in decisions related to sexual-

ity and reproductive health care without coercive legal or quasi-legal interference by religious institutions. As Catholics, CFFC members support policies of strict separation of church and state based not only on the U.S. Constitution but also on the Roman Catholic Declaration on Religious Liberty (Vatican II Dignitatis humanae, 7 December 1965) which declares: ". . . the civil authority must see to it that the equality of the citizens before the law, which is itself an element of the common good of society, is never violated either openly or covertly for religious reasons and that there is no discrimination among its citizens."

CATHOLICS FOR CHOICE OF ST. LOUIS support the right of poor and marginalized women to be recognized as mature human beings entitled to be made aware of all of the legal, medically possible, options available to them when faced with problem pregnancies. We deplore any attempt to raise the continued existence of every fertilized egg to a value higher than a pregnant woman's right to exercise her specifically human faculties of control over her life.

THE CENTER FOR CONSTITUTIONAL RIGHTS is a not-for-profit public interest law organization dedicated to providing legal support for progressive movements. It was founded in 1966 by lawyers active in the civil rights movement. It has litigated several cases concerning the effect on free speech of restrictions on government funding, including *Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53 (1st Cir. 1990) (*en banc*), *petition for cert. filed*, No. 89-1929 (June 11, 1990), which also challenges the regulations at issue here.

THE CENTER FOR WOMEN POLICY STUDIES (CWPS), founded in 1971, was the first national policy research and advocacy institute focused exclusively on issues of women's social and economic rights. The Center's current programs include the National Resource Center on Women and AIDS, the first national effort focused exclusively on women, particularly low income women and women of color; a key concern

is the potential abrogation of women's reproductive rights in the name of protecting public health. CWPS also is conducting the second stage—policy implementation and public education—of the Reproductive Laws for the 1990's Project. Finally, our Young Women's Project seeks to bring women in their twenties into the policy process and will address issues of reproductive choice from their perspectives.

COALITION FOR CHOICE OF VALPARAISO SCHOOL OF LAW, subscribes to the general statement of interest of *amici curiae*, *supra*, at p.1.

THE COMMONWEALTH OF MASSACHUSETTS was a plaintiff in the action that gave rise to the decision in *Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53 (1st Cir. 1990) (*en banc*), *petition for cert. filed*, No. 89-1929 (June 11, 1990), in which the regulations at issue in this case were enjoined nationwide. The Commonwealth has an interest in protecting its citizens from the devastating consequences that would result from implementation of the regulations.

D.C. RAPE CRISIS CENTER is a nonprofit organization providing counseling and advocacy to sexual assault survivors and community education on related issues to the Washington metropolitan area. We are a grassroots organization with a strong concern for all issues which affect women and children in our society; we focus our energy on those women and children traditionally disenfranchised due to poverty, racism, or other forms of oppression. The Center believes that all women should have access to safe and legal abortions and that all clinics, regardless of whether they receive Title X funding, should be free to provide accurate and comprehensive information on abortion to clients. To interfere with such a right concerns the Center because such a prohibition would not only lessen the availability of information on abortions, but would also disproportionately affect low-income women who rely solely on clinics funded by Title X for their medical services.

THE DOMESTIC VIOLENCE CENTER OF CHESTER COUNTY (Pennsylvania) is an organization which provides a hotline, safe housing, and comprehensive counseling to battered women. A great many of the women served are single parents with low incomes. These women must struggle to procure fair access to health care services. We strongly oppose inequitable treatment for low-income women denied fair access to medical services including abortion.

FEDERATION OF RECONSTRUCTIONIST CONGREGATIONS AND HAVUROT. Although the Jewish tradition regards children as a blessing, the tradition permits the abortion of an unborn child to safeguard the life and physical and mental health of the mother. The rabbis did not take a consistent stand on the question of whether the fetus resembles "a person." They did not think it possible to arrive at a final theoretical answer to the question of abortion, for that would mean nothing less than to be able to define convincingly what it means to be human. We recognize that abortion is a tragic choice. Any prospective parent must make an agonizing decision between competing claims—the fetus, health, the need to support oneself and one's family, the need for time for a marriage to stabilize, responsibility for other children and the like. Some of us consider abortion to be immoral except under the most extraordinary circumstances. Yet we sympathize with the anguish of those who must make the decision to abort or not to abort.

FLORIDA ASSOCIATION FOR WOMEN LAWYERS, DADE CHAPTER, INC. (FAWL-Dade) is a Florida corporation not for profit. Its purposes, as stated in the Articles of Incorporation, include improvement of the administration of justice, dissemination "to the public, particularly to women, information on legal rights and related sources of assistance" and promotion of "public awareness and elimination of abuses that diminish the integrity of the individual and family unit". FAWL-Dade is particularly concerned with the negative impact of the challenged regulations on these goals. We believe the regulations prevent the dissemination to women of

vital information about their legal rights and about other sources of assistance. We also believe the regulations diminish the integrity of women as individuals and the integrity of the family unit.

THE FUND FOR FREE EXPRESSION was formed in 1975 by a group of authors, publishers, journalists and interested individuals to champion Article 19 of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on December 10, 1948. Article 19 guarantees "the right of people the world over to express themselves freely without fear of retribution, the right to hold opinions without interference and the right to seek, receive and impart information through any media regardless of frontiers."

THE GAY MEN'S HEALTH CRISIS (GMHC), based in New York City, is the nation's oldest and largest community-based AIDS service, education and advocacy organization. As of May, 1990, approximately 7% of GMHC's 2830 active clients were women. The majority of our female clients are women of color. GMHC is concerned that our female clients and women in general affected by the HIV epidemic be able to make their own medical decisions and that one option that must be available is a safe and legal abortion regardless of a woman's financial status. All medical options must be presented to them in counseling, including the option of a safe and legal abortion. This counseling must be non-judgmental and objective.

HADASSAH, the Women's Zionist Organization of America representing over 385,000 members, supports the principle of individual freedom as guaranteed by the Bill of Rights to the Constitution of the United States, and opposes any federal, state or local regulations that diminish that guarantee. In this respect, Hadassah regards freedom of choice as a matter of privacy of the individual to be determined by each woman in accordance with her religious, moral and ethical values.

HAWAII WOMEN LAWYERS (HWL) was formed in 1976 to further the goals of women attorneys in Hawaii, and improve the status of all women. HWL supports the right of privacy and autonomy recognized in *Roe* v. *Wade* and *Griswold* v. *Connecticut*, and opposes any efforts to intrude upon rights of safe and legal access to family planning and abortion services.

HOLLYWOOD WOMEN'S POLITICAL COMMITTEE (HWPC) is comprised of politically active women from film, television, and the arts and is dedicated to supporting issues, candidates, and legislation which promote peace, equality, freedom of choice, and the conservation of the environment. Faced with the *Webster* decision in 1989, the HWPC and its sister foundation, the Hollywood Policy Center (HPC), took a lead role in organizing the entertainment community's contribution to securing the right to choice. Working in support of the grassroots activities of other national organizations, the HPWC put together a one-year effort to link a pro-choice agenda to public opinion through the use of media. Protection of the right to reproductive freedom contained in the federal Constitution, which, by definition, must include access to information concerning abortion services or referral, is one of the most significant legal issues facing women in Southern California, as well as the rest of the country. As such, it is clearly within the priority concerns of the Hollywood Women's Political Committee.

INSTITUTE OF WOMEN TODAY, subscribes to the general statement of interest of *amici curiae*, *supra*, at p.1.

THE JEWISH LABOR COMMITTEE (JLC) is the liaison organization that acts as the link between the organized Jewish community and the American trade union movement. It is active in defense of trade union, civil and human rights, and works to support diverse public policy issues of concern to organized labor and American Jewry. JLC has held a long-standing concern for individual rights and religious liberty and has steadfastly asserted that the constitutional right to

free speech is essential to the preservation of American democracy. JLC therefore opposes governmental coercion or constraint of information or full medical advice, including the option of abortion, to a person seeking such help.

JOURNAL OF WOMEN'S HISTORY, subscribes to the general statement of interest of *amici curiae*, *supra*, p.1.

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., founded in 1973, is the nation's oldest and largest national legal advocacy organization working in furtherance of the rights of lesbians and gay men. As an organization representing the lesbian and gay community's belief in the constitutional right to liberty and bodily autonomy, Lambda strongly supports the position that women in our society are constitutionally entitled to make their own decisions about whether to choose abortion. Inherent in this right is the right to receive all relevant information, including the option of abortion, in order to make an informed health care choice.

LAWYERS FOR REPRODUCTIVE RIGHTS is a Pennsylvania organization founded to educate fellow lawyers and the public on legal issues of reproductive rights and to work to ensure that all reproductive options are available. The organization represents approximately 800 lawyers in the greater Philadelphia metropolitan area.

LEARNING ALLIANCE, operating throughout the New York Metropolitan Area, is an independent non-profit education and social action organization. Through workshops, classes, conferences, work/study groups, celebrations and other creative formats, we seek to share information, skills, tools and other resources and move people to action on a wide range of community and social concerns including homelessness and housing justice, ecological concerns, women's issues, community health care, and neighborhood economics. We have a commitment to insure participation of all people. The Learning Alliance Reproductive Rights Leadership Training Project is designed to encourage local commu-

nity groups and reproductive rights activists and educators to cooperate towards the common goal of a better informed and more involved public with special attention paid to low income women and women of color who do not have access to the skills necessary for them to take effective action.

NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC. (NASW), a nonprofit professional association with over 120,000 members, is the largest association of social workers in the United States. Founded in 1955, NASW has chapters in every state as well as the Virgin Islands, Puerto Rico, and Europe. NASW is devoted to promoting the quality and effectiveness of social work practice, to advancing the knowledge base of the social work profession and to improving the quality of life through the utilization of social work knowledge and skill. NASW is deeply committed to the principle of self-determination and to the protection of individual rights and personal privacy.

NATIONAL COALITION OF AMERICAN NUNS, subscribes to the general statement of interest of *amici curiae*, *supra*, p.1.

NATIONAL CONFERENCE OF BLACK LAWYERS is a non-profit legal association of lawyers and legal workers organized in 1968. NCBL performs a broad range of legal support work around issues which impact the poor and communities of color. NCBL has a special interest in cases involving reproductive rights because people of color and the poor are disproportionately at higher risk if reproductive rights are denied.

THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE is a not-for-profit organization dedicated to the preservation and extension of civil liberties and civil rights. Founded in 1951, it has brought numerous actions in the federal courts to vindicate constitutional rights. Through its educational work, it likewise has sought to preserve our liberties. From time to time the National Emergency Civil Liberties

Committee submits *amicus curiae* briefs to the courts when it believes issues of particular import to civil liberties are at stake.

NATIONAL GAY RIGHTS ADVOCATES (NGRA) is a non-profit, public-interest law firm dedicated to the protection and expansion of the rights of lesbians, gay men and persons with HIV infection. NGRA engages in litigation and community education throughout the United States on behalf of its members, a substantial percentage of whom are women. An integral facet of NGRA's mission is the protection of freedom of expression and the right to privacy, including the preservation of unimpaired access to information allowing individuals to make informed decisions regarding their own lives and their own bodies. *Amicus*' interest herein is to ensure that all women are guaranteed full access to information regarding their established right to terminate a pregnancy and further, to ensure that the critical right to freedom of speech is not eroded.

NEW YORK WOMEN IN CRIMINAL JUSTICE is an organization of women whose members include police, probation and correction officers; judges, attorneys, and social workers; others who work in the criminal justice system; inmates and ex-offenders. Our main concerns are that offenders who go through the system not come out worse than when they went in, and that as many offenders as possible be diverted from the system. We also strongly support the right of a woman to choose abortion, knowing that the offspring of women in prison become the dysfunctional children in school and often the criminals of the future. The right to abortion should not be restricted to only women who can afford abortions (whether or not they remain legal); the right to choose should be available to all women, most especially those who understand the heavy burden that would be imposed upon both the children and the women in and just out of prison.

OAKHURST PRESBYTERIAN CHURCH (Georgia) and denomination support the right of all women to have access

to safe and legal abortions. We affirm that the final decision must be made between a woman and God.

THE ORGANIZATION FOR BLACK STRUGGLE is a non-profit grass-roots community organization whose primary objective is to organize and empower poor and disenfranchised people to fight for their human and civil rights, to improve their quality of life, and to make fundamental changes in the society to insure justice, equality and peace for all its citizens. For over a decade, we have been in the forefront of the struggle for economic, social and political empowerment of the African American community in St. Louis. We believe that women must receive complete, accurate and unbiased information about their health care and reproductive options in order to make informed decisions about their lives. The rights of women should not be waived simply because of gender or income. We are relying on the courts to unconditionally uphold these rights.

P.E.N. AMERICAN ("PEN") CENTER is a nonpartisan, nonprofit organization of over 2,400 writers and an affiliate of International P.E.N, a worldwide association of poets, playwrights, essayists, editors and novelists. PEN works for the unhampered transmission of thought within every nation and between all nations and is opposed to all forms of suppression of freedom of expression in the countries and communities to which its members belong.

POPULATION COMMUNICATION is an international, non-profit organization which communicates population and environmental messages to world leaders through books, reports, mailings, news releases, and motion pictures. During the last twelve years, it has obtained the support of forty-eight world leaders for a Statement of Population Stabilization.

THE POPULATION COUNCIL, an international, nonprofit organization established in 1952, undertakes social and health science programs and research relevant to developing coun-

tries and conducts biomedical research to develop and improve contraceptive technology. The Council provides advice and technical assistance to governments, international agencies, and nongovernmental organizations, and it disseminates information on population issues through publications, conferences, seminars, and workshops. The First Amendment issues in *Rust* v. *Sullivan* are directly analogous to issues that affect the Council vitality under the "Mexico City" policy of the United States Agency for International Development.

POPULATION CRISIS COMMITTEE (PCC) seeks to increase public awareness, understanding and action towards the reduction of population growth rates through voluntary family planning. PCC supports privately funded projects in developing countries that provide medical training in the treatment of complications of abortion, including incomplete abortions, and in menstrual regulation procedures in countries where abortion is legal. The Title X regulations which restrict abortion counseling are virtually identical to restrictions under the "Mexico City Policy" imposed on foreign organizations receiving U.S. Government foreign aid funds. PCC believes these regulations, as applied both domestically and internationally, are unconstitutional, and, on the international level, violate the right of PCC to freedom of speech and association with respect to its funding of abortion services and abortion law reform in foreign countries.

PRO-CHOICE NETWORK OF WESTERN NEW YORK, INC. is a regional group with 4,500 members. Among others, this membership includes people who provide abortion and other reproductive health services to women, people who counsel women about their reproductive options, and women who have sought or who may seek abortion as one of their reproductive options. The Network started in late 1988 and was incorporated in May 1989. The purposes of the Pro-Choice Network are to bring organizations and individuals together to preserve and support women's constitutional reproductive rights, to educate the general public regarding these rights, and to undertake actions to publicize the significance of these rights and threats to them. The Pro-Choice Network of Western New York recognizes that guaranteeing women the full range of reproductive choices is critical to preserving their health, their autonomy and equality. We also believe that the contested Title X regulations deny clinic workers their right to free speech, and deny patients the right to make informed decisions about a private, medical matter.

PRO-CHOICE RESOURCES is an organization committed to educating individuals on all reproductive options. We strive to provide information on reproductive health in order to encourage people to make rational, responsible decisions. We feel that the issue of abortion is a private matter. One key program of Pro-Choice Resources is an Emergency Assistance Fund for low-income women. It is through this program that we see the importance of including abortion as a viable option for women. Accurate information on this medical procedure is imperative in order for women and families to make informed decisions about their lives. We encourage you to strike down any restrictions on the use of Title X funding.

REFUSE AND RESIST! is a national organization with chapters in most major cities with memberships ranging in the several thousands. R&R! is a nonpartisan, direct action organization that exposes and rallies against art censorship, restrictions on women's reproductive rights, the sham "war on drugs" which we consider a war on Black and Latino youth, and the locking up of immigrants by the Immigration and Naturalization Service.

THE RELIGIOUS COALITION FOR ABORTION RIGHTS (RCAR) is a national coalition of 35 Protestant, Jewish, and other faith groups committed to the preservation of religious liberty as it relates to our reproductive freedom. Each denomination and faith group represented among us approaches the issue of choice from the unique perspective of its own theology with members holding widely varying viewpoints as to when abortion is morally justified. It is exactly

this plurality of beliefs which leads us to the conviction that the abortion decision must remain with the individual to be made on the basis of conscience and personal religious principles, free from government interference.

SOUTHERN STUDENTS FOR CHOICE is a Florida-chartered nonprofit corporation, incorporated in 1989 to organize students in the southeastern states to protect and advance reproductive freedom for people in the southeast, in particular for the less advantaged, such as poor people, young people, and people of color.

THE SOUTHWEST COALITION FOR CHOICE is a coalition of fifteen organizations covering West Texas and the State of New Mexico with a combined membership of 4500. Its goals are to prevent or abolish restrictive abortion legislation as well as government and private actions which impinge on a woman's right to reproductive freedom.

TARRANT COUNTY, TEXAS CHOICE NETWORK is a coalition formed in 1983 and dedicated to keeping abortion safe and legal and to assuring reproductive freedom for all women, regardless of age or economic status.

TRANSNATIONAL FAMILY RESEARCH INSTITUTE (TFRI) is a multidisciplinary, nongovernmental, and nonprofit research organization in the behavioral sciences. TFRI develops and conducts research in reproductive behavior, often in cooperation with colleagues abroad. Research interests focus on the behavioral regulation of fertility, motivations for pregnancy resolution, and the decision making process. TFRI currently has offices in Palo Alto, California; Copenhagen, Denmark; Mexico City, Mexico; and Bangkok, Thailand. Since 1972, the Institute has published *Abortion Research Notes*, reviewing scientific literature related to pregnancy termination.

THE UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE) is a national labor organi-

zation committed to organizing workers regardless of craft, race, nationality, sex, age, religion, political belief, or immigration status and to representing and defending its membership in their efforts to improve their wages, working and living conditions. The UE has a proud history of fighting for the rights of women, not only in the workplace but in the courts and legislative arena as well. The right of poor and working women to obtain safe, legal abortions grew from the horror, illness and death which accompanied illegal abortions and the tragedy which haunts the lives of unwanted children. This history does not bear repeating; poor and working women must be given access to the full range of information and services family planning clinics have to offer.

UNITED STATES STUDENT ASSOCIATION (USSA) is a nationwide nonprofit membership organization which represents approximately two million students at approximately 200 colleges and universities throughout the United States. USSA has a strong commitment to ensuring access to higher education and the right to self-determination for all individuals regardless of age, gender, economic status, race, disability, sexual/affectional orientation, or veteran status.

WOMEN EMPLOYED is a national organization of working women, based in Chicago, with a membership of 1500. Over the past seventeen years, the organization has assisted thousands of working women with problems of sex discrimination. Women Employed works to empower women to improve their economic status and to remove barriers to economic equity through advocacy, direct service and public education. Women Employed strongly believes that any limitations on women's reproductive rights will have a profoundly negative impact on women's opportunities to achieve economic equity.

WASHINGTON WOMEN UNITED (WWU) founded in 1978, is a private nonprofit organization whose purpose is to lobby the Washington state legislature on issues of concern to women. Reproductive choice is WWU's first legislative prior-

ity. The organization has opposed state legislation that would limit a woman's reproductive choice. WWU is also active in a state coalition that has worked to maintain Medicaid funds for abortion.

WOMEN'S ALLIANCE THEOLOGY, ETHICS AND RITUAL (WATER) is a nonprofit educational center that empowers women and men to be religious agents. The cofounders/co-directors work with an interfaith team of ministers, activists and professors to bring about change and move toward inclusivity in church and society. Through programs, projects and publications, WATER provides women and men with resources to foster equality and create a "discipleship of equals." WATER signs the *amicus* brief because the organization is committed to equality and choice for all women, especially for poor women. WATER constituents come from a variety of backgrounds and sets of beliefs on reproductive rights. But the values of free discussion, legal options and religious pluralism are prized among us. We urge this for society as a whole.

WOMEN'S AMERICAN ORT (Organization For Rehabilitation Through Training), a Jewish women's organization consisting of more than 1000 chapters nationwide, reaffirms its long-held position that when and whether to bear a child is a woman's private decision, and should not be subject to intervention through legislation, constitutional amendment, governmental regulation, or judicial decree. The sole determinants for a woman making such a decision should be her own personal convictions, needs and capacities. We deplore any measures which erode these fundamental rights of choice and privacy, including the regulations prohibiting abortion counseling and referral for patients attending clinics funded under Title X of the Public Health Service Act. Not only do these regulations comprise a deprivation of the right of the health provider's full communication and the patient's right to knowledge of her options, they also victimize society's most vulnerable women—the poor and disadvantaged. Women's American ORT will stand firm in its opposition to

any attempts to narrow family planning services or to narrow women's opportunities to control their own lives.

THE WOMEN'S LAW CENTER, INC. is an advocacy organization whose membership consists of attorneys and judges in the State of Maryland. In existence since 1971, the goal of the Women's Law Center is to promote the legal rights of women through litigation, legislation and education. Our organization believes the regulations at issue in *Rust* v. *Sullivan*, which would deny federal funding for family planning programs that provide abortion information, services or referral, pose a critical threat to the reproductive rights of women.

WOMEN LAWYERS' ASSOCIATION OF LOS ANGELES (WLALA), founded in 1919, is the largest local bar association in the State of California emphasizing the concerns of women. WLALA has as members over 1200 female and male lawyers, judges, and law students who are personally and professionally concerned with the importance of preserving a woman's right to choose for herself whether to terminate a pregnancy.

WOMEN LAWYERS' ASSOCIATION OF MICHIGAN is an 1,100-member professional association, founded in 1919 for the purposes of securing the rights of women in society, advancing the interests of women lawyers, improving the administration of justice, and promoting equality and social justice for all people. It adopted a pro-choice policy many years ago, believing it fundamental that constitutional privacy rights protect individuals from governmental intrusion into reproductive decision-making.

WOMEN'S MEDICAL FUND, INC. is a volunteer charity that has helped homeless, indigent and needy women pay for abortions since 1972. Our organization supports the legal action to challenge the Department of Health and Human Services regulations (the "gag rule") relating to abortion because they discriminate against women.

Nos. 89-1391, 89-1392

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DR. IRVING RUST, on behalf of himself, his patients and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondents.

THE STATE OF NEW YORK, THE CITY OF NEW YORK, THE NEW YORK CITY HEALTH & HOSPITALS CORP.,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* NOW LEGAL DEFENSE AND EDUCATION FUND AND 117 ORGANIZATIONS COMMITTED TO WOMEN'S EQUALITY IN SUPPORT OF THE PETITIONERS

(List of *Amici Curiae* on inside cover)

Sarah E. Burns
Alison Wetherfield
NOW LEGAL DEFENSE AND EDUCATION FUND
99 Hudson Street
12th Floor
New York, New York 10013

John H. Hall
Counsel of Record
Geoffrey H. Coll
Claudia A. Lewis
Randi J. Roberts
Mallika Dutt
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, New York 10022

Attorneys for Amici Curiae

AMICI CURIAE

Abortion Rights Mobilization
ActionAIDS
All Peoples Congress
American Association of University Women
American Humanist Association
American Jewish Committee
Americans for Religious Liberty
Asian American Legal Defense and Education Fund
Association for Voluntary Surgical Contraception
Association for Women in Psychology
AWARE
Beverly Hills Bar Association
Black Women's Agenda, Inc.
Bradford County Coalition for Choice
Brooklyn Women's Political Caucus
California Women Lawyers
Canadian Abortion Rights Action League
Center for Law & Social Justice
Center for Public Representation
Colorado Women's Bar Association
Columbia-Greene Rape Crisis Center
Committee for Hispanic Children and Families
Committee to Defend Reproductive Rights
CHOICE
Disabled in Action of Metropolitan New York
Equal Rights Advocates, Inc.
Federation of Feminist Women's Health Centers
Feminist Institute
Hispanic Health Council
Human Rights Campaign Fund
Institute for Women's Policy Research
International Agency for Minority Artist Affairs
Jessie Smith Noyes Foundation
League of Women Voters of the United States
MADRE
Men of All Colors Together New York
Mobilization for Youth Health Services, Inc.
Ms. Foundation For Women
My Sister's Place Washington, D.C.
My Sister's Place New York
Nation Institute
National Abortion Rights Action League
National Association of Commissions for Women
National Center for Lesbian Rights
National Coalition Against Domestic Violence
National Council of Jewish Women
National Council for Research on Women
National Latina Health Organization
National Law Center on Homelessness and Poverty
National Lawyers Guild
National Medical Association
National Organization for Women
National Republican Coalition for Choice
National Woman Abuse Prevention Project
National Women's Health Network
National Women's Law Center
National Women's Political Caucus
New Directions for Women
New Jewish Agenda
New York Asian Women's Center
New York City Coalition for Women's Mental Health
New York Coalition of 100 Black Women
New York Pro-Choice Coalition
New York State Republican Family Committee
New York University Law Women
New York Women in Criminal Justice
Northwest Women's Law Center
Older Women's League
Organization for Obstetric, Gynecologic, and Neonatal Nurses
Pathfinder Fund
Pembroke Center for Teaching and Research on Women Brown University
Project Choice: AIDS Education for Women of Color
Project on Women & Disability
Queen's Bench Bar Association of the San Francisco Bay Area
Racism & Homophobia in the Media Project
Radical Women
Rainbow Lobby, Inc.
Reproductive Health Services
San Francisco Women Lawyers Alliance
Santa Fe Health Education Project
Sex Information and Education Council of the United States
Southern California Women's Law Center
Students and Youth Against Racism
Students Organizing Students
Tucson Women's Commission
Union of American Hebrew Congregations
United Auto Workers District 65
Unitarian Universalist Association
Unitarian Universalist Women's Federation
United Church Board for Homeland Ministries
United Synagogue of America
VOICES In Action
Voters for Choice
Woman's Law Project
Women and AIDS Coalition
Women for Racial and Economic Equality
Women in Crisis Committee
Womenspace
Women USA
Women's Bar Association of Illinois
Women's Bar Association of Massachusetts
Women's Bar Association of the State of New York
Women's City Club of New York, Inc.
Women's Educational Center, Inc.
Women's Equal Rights Legal Defense and Education Fund
Women's Health Action and Mobilization
Women's International Resource Exchange
Women's Legal Defense Fund
Women's Project
Women's Studies Program Hunter College, City University of New York
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INTEREST OF *AMICI CURIAE*

This brief is filed on behalf of NOW Legal Defense and Education Fund and 117 organizations which share a common concern for the protection of women's rights, and in particular the fundamental right to reproductive autonomy, necessary to fulfill the Constitution's promises of liberty and equality for all. These organizations, representing millions of individual women and men from diverse backgrounds, have joined together to urge this Court to grant the relief sought by Petitioners and permanently enjoin the Title X regulations at issue. They believe the regulations profoundly impede exercise of the fundamental right to reproductive decisionmaking essential to the health and the lives of the millions of low income women who are served by federally funded family planning clinics. (Further statements of interest of *amici* are set forth at Appendix A.)

Amici have the consent of the parties to file this brief. Letters of consent have been filed separately with this Court.

SUMMARY OF ARGUMENT

The Title X regulations at issue prohibit abortion counseling and require referral for prenatal care only, and thus impermissibly burden women's constitutionally protected right to reproductive decisionmaking. That unconstitutional burden translates into concrete risks to the health and the lives of poor women—a disproportionate number of whom are young women and women of color—who are served by Title X clinics.

Under the guise of encouraging childbirth, the regulations prevent women seeking help at Title X clinics from receiving complete and unbiased medical advice about reproductive options. The ban on abortion information puts at risk the health and the lives of pregnant women, particularly those for whom complicating physical conditions make abortion a critical medical option. The regulations thus affirmatively interfere with a woman's constitutionally protected decision, informed by her physician, of whether or not to carry her

pregnancy to term. The regulations also impermissibly infringe the basic first amendment right of the women served by Title X clinics to receive accurate reproductive health information from their health care providers. Finally, the regulations deprive women of equal protection under the law because they discriminate on the basis of gender and do so in a way that implicates a woman's fundamental right to choose abortion and to receive information essential to informed reproductive health care.

The governmental purpose in enacting the regulations—to encourage childbirth by curtailing access to information about abortion and abortion services—and the regulatory scheme devised to effect that purpose cannot survive strict scrutiny. The scheme cannot even stand as a rational means to achieve the government's purpose, given that the regulations both contravene the aim of Title X to promote public health and mandate violations of accepted medical practice.

Amici respectfully urge this Court to reject, as it has in the past, this blatant attempt to interfere with constitutionally protected reproductive decisions.

ARGUMENT

I. THE REGULATIONS UNDULY BURDEN A WOMAN'S FUNDAMENTAL PRIVACY RIGHT TO MAKE INFORMED REPRODUCTIVE DECISIONS FREE FROM UNWARRANTED GOVERNMENTAL INTERFERENCE.

The regulations prevent the women served by Title X clinics from freely and independently deciding whether or not to carry a pregnancy to term, as is their right under *Roe v. Wade*, 410 U.S. 113 (1973), and cases following *Roe*. By suppressing all mention of abortion while simultaneously compelling referral for prenatal care, the regulations impermissibly intrude into the physician-patient dialogue concerning reproductive options.[1] Through the funding mechanism, they create significant obstacles to the constitutionally protected right of women seeking health care at Title X clinics to decide, with the necessary information at their disposal, whether or not to carry pregnancies to term.

The Court has recognized that if the sphere of "liberty" guaranteed under the due process clauses of the fifth and fourteenth amendments is to "extend[ ] to women as well as to men," women must have the autonomy to decide whether and when to bear children, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986), and to be free from unwarranted governmental intrusion into "matters so fundamentally affecting a person as the decision whether to bear or beget a child," *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). *See Hodgson v. Minnesota*, 58 U.S.L.W. 4957, 4961 (U.S. June 25, 1990) & 4968 (O'Connor, J., concurring); *Harris v. McRae*, 448 U.S. 297, 312-318 (1980); *Carey v. Population Services International*, 431 U.S. 678, 685, 687 (1977); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 502-03 (1965) (White, J., concurring). Absent the right to decide whether or not to terminate a pregnancy, the freedom to make the child-bearing decision would be hollow.[2]

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1 The regulation's ban on abortion counseling and referral affects not only women who are already pregnant, but also women using Title X family planning services for non-pregnancy related needs. *See infra* p. 20 & note 39.

2 Because of advances in modern medicine, no bright line can be drawn between the decision to abort and the decision not to conceive. Both oral contraceptives and the intrauterine device operate after fertilization. *See* R. Hatcher, E. Guest, F. Stewart, J. Trussell, S. Bowen & W. Cates, *Contraceptive Technology* 252-53, 377 (14th rev. ed. 1988). Moreover, no method of birth control is 100 percent effective. *See* Jones & Forrest, *Contraceptive Failure Rates in the United States*, 21 Fam. Plan. Persp. 103 (1989). The failure rates for contraceptives used for a 1-year period are as follows: the Pill-6.2%; the condom-14.2%; the diaphragm-15.6%; the rhythm method-16.2%; and spermicides-26.3%. *Id.* at 109. A study of women who had abortions in 1987 revealed that 51.3% had been using a contraceptive method during the month in which they became pregnant. Henshaw & Silverman, *The Characteristics and Prior Contraceptive Use of U.S. Abortion Patients*, 20 Fam. Plan. Persp. 158, 167 (1988).

Furthermore, because of the high risks of sexual violence, no woman of child-bearing capacity is safe from an unwanted pregnancy. *See* Federal

Recognizing that a woman needs medical advice to decide whether or not to continue a pregnancy, the Court has carefully protected the physician's role in the woman's decision-making process. *See, e.g., City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 447 (1983). Because her decision is "inherently, and primarily, a medical decision," *Roe v. Wade*, 410 U.S. 113, 153 (1973), and "an important and often a stressful one," *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 67 (1976), it is "desirable and imperative that [the decision] be made with full knowledge of its nature and consequences," *id.* Only by providing pregnant women with all the medical facts that bear upon the decision, can physicians assist women to make *informed* reproductive choices about one of the most important decisions in life.

For all women, pregnancy entails "profound physical, emotional and psychological consequences." *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 471 (1981) (Rehnquist, J.). For many women, pregnancy, labor and delivery pose significant medical risks, particularly when caesarean sections account for one out of four deliveries. *See* D. Danforth, M. Hughey & A. Wagner, *The Complete Guide to Pregnancy* 228-31 (1983). The medical risks associated with carrying pregnancy to term should not be underestimated: of every ten women who experience pregnancy and childbirth, six are treated for some medical complication, and three are treated for major complications. *See* R. Gold, A. Kenney & S. Singh, *Blessed Events and the Bottom Line: Financing Maternity Care in the United States* 10 (1987).

In comparison, legal abortion is safer than childbirth. Less than one percent of all abortion patients experience a major complication associated with the procedure. *See* The Alan

Bureau of Investigation, *Uniform Crime Reports for the United States* 6, 13-15 (1987) (in 1987, one forcible rape every six minutes); N.Y. Times, Sept. 28, 1987, at B5, col. 1 (113,000 cases of child sexual abuse reported in 1985); S. Apeton, *Sexual Assault Among Adolescents* 130-34 (1983) (very high incidence of date rape among adolescents); D. Finklehor & K. Yllo, *License to Rape: Sexual Abuse of Wives* 6-8 (1985) (estimating 10-14% of all married women experience marital rape).

Guttmacher Institute, *Abortion and Women's Health: A Turning Point for America?* 32 (1990). At eight weeks of gestation or earlier, the risk of death from abortion is about 20 times lower than that of childbirth; at no point during pregnancy is abortion more dangerous than childbirth. *See* LeBolt, Grimes & Cates, *Mortality from Abortion and Childbirth: Are the Populations Comparable?*, 248 J. Am. Med. A. 188, 191 (1982).

As the primary source of federal support for family planning and reproductive health services, funding over 3,900 clinics nationwide, Title X served 4.3 million low income women in 1988, with a target population consisting of an estimated 14.5 million women at risk of unintended pregnancy, including 5 million adolescents between the ages of 15 and 19. Note, *The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights?*, 41 Stan. L. Rev. 401, 408 (1989) (collecting sources). Thirty percent of these women are women of color, *see* The Alan Guttmacher Institute, *Organized Family Planning Services in the United States 1981-1983* 28, 30 (1984), and eighty percent have incomes below 150 percent of the poverty line, *see* Declaration of Dr. Stanley Henshaw, Deputy Director of Research, The Alan Guttmacher Institute, ¶ 18 (194JA).[3]

The right to make informed decisions concerning reproductive health care is particularly important for the low-income women served by Title X. The communities in which they live suffer from disproportionately high rates of teenage pregnancy and a myriad of diseases (high blood pressure, hypertension, diabetes, cancer, sickle cell anemia and AIDS) that increase the risks associated with pregnancy.[4] Pregnant teen-

3 Citations to the joint appendix that accompanies the Petitioners' Briefs are made to the page number therein as "(_____ JA)." Citations to the appendix that accompanied the Petitions for Writ of Certiorari are made to the page number therein as "(_____ a)." Citations to the joint appendix filed in the Second Circuit are made to the page number therein as "(_____ A)."

4 *See generally* M. Rudov & N. Santangelo, *Health Status of Minorities and Low-Income Groups* (1979). The AIDS epidemic has particularly severe consequences for these communities. A recent study predicts that by

age women are twenty-four times more likely to die from childbirth than from a first trimester abortion. Carlson, *Abortion's Hardest Cases*, Time, July 9, 1990, at 22, 25. Black women, disproportionately represented in low-income communities,[5] are nearly three times more likely to die from complications of pregnancy or childbirth than are white women. U.S. Dep't of Health and Human Services, *Health: United States 1989*, at 33 (1990).

By prohibiting any mention of abortion, *see* 42 C.F.R. §§ 59.8(a)(1)-(4) (1989), the Title X regulations deprive low income women of full health care counseling and information critical to their reproductive decision-making and treatment. Section 59.8 of the regulations forbids practitioners in Title X clinics from informing their patients either of the availability of abortion or where abortion-related information can be obtained. 42 C.F.R. § 59.8(a)(1) (1989). Even when women request information about abortion, they may be told only that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." 42 C.F.R. § 59.8(b)(5) (1989). Furthermore, the regulations do not simply censor abortion-related speech: they require that pregnant women be given a list of health care providers "that promote the welfare of mother and unborn child." 42 C.F.R. § 59.8(a)(2) (1989). This referral list must include all available prenatal care providers that do not perform abortions, and it cannot include any health care providers that offer abortion as their "principal business." 42 C.F.R. § 59.8(a)(3) (1989).

1991, AIDS will become one of the five leading causes of death among women in the childbearing years nationwide. Chu, Buehler & Berkelman, *Impact of Human Immunodeficiency Virus Epidemic on Mortality in Women of Reproductive Age, United States*, 264 J. Am. Med. A. 225 (1990). The racial disparities uncovered by the study are dramatic: in 1988, AIDS killed nine times as many black women as white women. *Id.* at 226. AIDS is already the leading killer of black women of childbearing years in New York and New Jersey. *Id.* at 227.

Pregnancy both accelerates the course of AIDS in a child-bearing woman and poses a 30-50% risk that her newborn baby will be HIV-infected. *See* Minkoff, *Care of Pregnant Women Infected With Human Immunodeficiency Virus*, 258 J. Am. Med. A. 2714 (1987).

5 In 1984, 32.3% of Black women and 26.4% of Hispanic women lived below the poverty level, as compared to 11.5% of white women. Wilson, "Women and Poverty: A Demographic Overview," in *Women, Health and Poverty* 26 (C. Perales & L. Young eds. 1988).

While the government may implement "a value judgment favoring childbirth over abortion . . . by the allocation of public funds," *Maher v. Roe*, 432 U.S. 464, 474 (1977), it cannot, absent a compelling justification, place "obstacles—absolute or otherwise—in the pregnant woman's path to an abortion." *Id.* By altering medical counseling through withholding information concerning abortion and prescribing information designed to cause women to carry to term, the regulations erect significant obstacles to women's reproductive decisionmaking, hidden but nevertheless very real to the women served by Title X. The regulations' intrusion into the physician-patient dialogue impermissibly crosses the line between "state encouragement of an alternative activity consonant with legislative policy" and "direct state interference with a protected activity." *Maher*, 432 U.S. at 475.

Unlike the selective subsidies of childbirth upheld in *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), and the selective allocation of public hospitals and staffs upheld in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3052-53 (1989), the Title X regulations seek to encourage childbirth by affirmatively impairing women's reproductive choice. *Maher* and *McRae* involved refusals to fund abortions,[6] not governmental schemes to interfere with a woman's decisionmaking process by withholding information and providing misinformation. In *Reproductive Health Services v. Webster*, 851 F.2d 1071, 1080 (8th Cir. 1988) (en banc), the Eighth Circuit distinguished Missouri's ban on "encouraging or counseling" abortion from the restrictions in *Maher* and *McRae*, declaring that it could

6 In *Maher*, the Court observed that the statute at issue "imposed no restriction on access to abortions that was not already there." 432 U.S. at 474. Similarly, the Court noted in *McRae* that the funding restriction left an indigent woman "with at least the same range of choice in *deciding* whether to obtain a[n] . . . abortion as she would have had if Congress had chosen to subsidize no health care costs at all." 448 U.S. at 317 (emphasis added).

"perceive of few obstacles more burdensome to the right to decide than a state-imposed blackout on the information necessary to make a decision."[7] The Title X regulations present an *a fortiorari* case, for they not only impose a blackout, but they also compel Title X health care providers to transmit skewed information that will mislead Title X patients into carrying pregnancies to term.

The Title X regulations are an even more serious interference in the physician-patient dialogue than were the requirements struck down in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 444 (1983), that compelled health care providers to disseminate information "designed to influence the woman's informed choice between abortion or childbirth."[8] The Title X regulations obstruct the decisionmaking process more aggressively than did the Pennsylvania statute struck down in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), which required physicians to provide their pregnant patients with a description of fetal development and a list of agencies offering alternatives to abortion.[9]

7 The Court did not address the constitutionality of Missouri's ban on counseling in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989). The issue was dismissed as moot because the State interpreted the restriction as directed not at the conduct of any physician or health care provider, but only at those responsible for expending funds. *Id.* at 3053-3054.

8 In *Akron*, the Court held that by forcing physicians to furnish all their pregnant patients with an "inflexible list of information," the ordinance "unreasonably . . . placed 'obstacles in the path of the doctor upon whom [a woman is] entitled to rely for advice in connection with her decision.' " *Akron*, 462 U.S. at 444-445 (quoting *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977)). The Court reasoned that "full vindication of the woman's fundamental right [to reproductive choice] necessarily requires that her physician be given 'the room he needs to make his best medical judgment.' " *Id.* at 427 (quoting *Doe v. Bolton*, 410 U.S. 179, 192 (1973)). That room includes the physician's discretion to provide her pregnant patient with information relevant to her particular needs, *id.* at 443, when "both assisting the woman in the decisionmaking process and implementing her decision should she choose abortion," *id.* at 427.

9 The Court described these requirements as "an outright attempt to wedge Pennsylvania's message discouraging abortion into the privacy of the informed consent dialogue between the woman and her physician." *Thornburgh*, 476 U.S. at 762. The Court acknowledged that even standing alone the list of prenatal and neonatal care agencies could not pass constitutional muster:

> Even the listing of agencies . . . presents serious problems: it contains names of agencies that well may be out of step with the needs of the particular woman and thus places the physician in an awkward position and infringes upon his or her professional responsibilities. Forcing the physician or counselor to present the materials and the list to the woman makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list. All this is, or comes close to being, state medicine imposed upon the woman, not the professional medical guidance she seeks, and it officially structures—as it obviously was intended to do—the dialogue between the woman and her physician.

Id. at 762-63 (citation omitted).

10 *See also* American College of Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services* 57 (6th ed. 1985) ("In the event of an unwanted pregnancy, the physician should counsel the patient about her options of continuing the pregnancy to term and keeping the infant, continuing the pregnancy to term and offering the infant for legal adoption, or aborting the pregnancy.") For a fuller discussion of the ethical issues raised, see Briefs of *Amici Curiae* the American Public Health Association, *et al.* and the American College of Obstetricians and Gynecologists, *et al.*

Contrary to professional standards that require balanced counseling and discussion of the full range of options to which a woman is entitled when pregnancy is diagnosed, *see* American College of Obstetricians and Gynecologists, Statement of Policy: Further Ethical Considerations in Induced Abortion 2-3 (Dec. 1977),[10] the regulations require Title X health care providers to direct their counseling solely towards promoting childbirth. Health-related abortion restrictions that so "depart from accepted medical practice," *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. at 431 & 454 (O'Connor, J., dissenting), as these regulations do, unduly burden a woman's right to decide whether or not to continue a pregnancy.

By censoring information on abortion and compelling referral for prenatal care, section 59.8 of the regulations will lead many women to believe wrongly that abortion is not an available option. Some women, especially those who are uneducated or immigrants from countries where the right to

abortion is restricted, may be prevented from discovering that abortion is legal in the United States.[11] Out of fear of incurring their doctor's disapproval or exposing themselves to prosecution, many women will be reluctant to break the silence on abortion and ask about it. The regulations deprive these women of the opportunity to decide whether or not to continue a pregnancy, for they will not even realize they have a choice to make.

Those women who know abortion is an option and ask about its availability must be told only that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." 42 C.F.R. § 59.8(b)(5) (1989). Many women will understand this message to mean that they have no safe alternative to carrying their pregnancy to term and that abortion is not appropriate for them. Declaration of Dr. Irving Rust, Medical Director of the Bronx Center of Planned Parenthood, New York City, ¶ 15 (254JA).[12] If information on the health of their "unborn child" is the only guidance women receive, they may well feel compelled to carry to term, or to turn to dangerous attempts to self-abort or even to suicide.[13] Teenage girls, who are often scared, ashamed and alone when faced with pregnancy, are particularly susceptible to suggestion from their physicians that abortion is not permissible or available. Declaration of Toni Morgan, ¶¶ 7-8 (219-220JA).

Even the women who resist the government's censorship attempts, identify abortion as a safe and legal option, and

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11 *See generally* C. Tietze & S. Henshaw, *Induced Abortion: A World Review* (6th ed. 1986). In fact, ignorance regarding the availability of abortion is pervasive throughout American society. *See* National Abortion Rights Action League, Hickman-Maslin Research Poll for American Viewpoint 4 (1987) (36% of American adults believe that abortion is available during the first three months of pregnancy only under "extreme circumstances" or is "not allowed").

12 Even if women are unsure of the meaning of this message, few will ask their doctors for fuller explanation because all patients are conditioned to "follow doctors' orders" unquestioningly. *See* Katz, *Physician-Patient Encounters "On a Darkling Plain,"* 9 W. New Eng. L. Rev. 207, 215 (1987).

13 Declaration of Dr. Irving Rust ¶¶ 11 (252JA), 14-16 (253-54JA).

choose to obtain abortions are harmed by the increased health risks and costs caused by the delay the regulations impose on their process of obtaining appropriate health care. *See Massachusetts v. Secretary of Health & Human Services*, 899 F.2d 53, 69-70 (1st Cir. 1990) (en banc). Under the regulations, women who enter Title X facilities with false, but not unreasonable, expectations of balanced counseling will be referred only to prenatal clinics—even if they express their desire to terminate their pregnancy. Though there may be some abortion providers on the list of prenatal care providers given them, women will not be able to identify the abortion providers except by a series of telephone calls or hit or miss visits to several facilities. This is particularly onerous for low income women who often lack access to a car, the fare for other transportation or even a telephone.[14] Combined with scheduling difficulties, work and child care commitments, school and transportation problems, this circuitous path to abortion may entail delays of days, weeks or even months. Such delays may well push women into the second trimester of pregnancy, significantly increasing the health risks for those women who choose abortions.[15] For the thousands of teenagers whose denial, fear, shame and uncertainty often result in a late initial visit to a clinic,[16] further delay resulting from the regulations can be critical.

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14 *See* Nsiah-Jefferson, "Reproductive Laws, Women of Color and Low-Income Women," in *Reproductive Laws for the 1990s* 24 (N. Taub & S. Cohen eds. 1988).

15 The Court recently noted that an abortion delay of 48 hours to a week or more "increased the medical risk associated with the abortion procedure to 'a statistically significant degree.' " *Hodgson v. Minnesota*, 58 U.S.L.W. 4957, 4963 (U.S. June 25, 1990) (accepting the finding of the District Court). With each passing week in the second trimester, the risks of major complications from even a legal abortion increases by approximately 30 percent and the mortality risk by 50 percent. Declaration of Dr. George Morley ¶ 12, President of the American College of Obstetricians and Gynecologists, (227JA).

16 *See Hodgson v. Minnesota*, 58 U.S.L.W. at 4970 (Marshall, J., concurring in part and dissenting in part) (citing 1 National Research Council, *Risking the Future: Adolescent Sexuality, Pregnancy and Childbearing* 114 (C. Hayes, ed. 1987)).

In addition to increasing health risks, delay makes abortion more costly[17] and difficult to obtain.[18] This is especially true for low income women living in rural areas where abortion providers are scarce and women often have to travel to another county or even another state to obtain an abortion.[19] Because most of the women served by Title X do not have access to alternative health care,[20] many will learn of affordable abortion clinics only through word of mouth. In their desperate and frustrated quest to end an unwanted pregnancy, some women will find and turn to illegal abortionists.[21] For these women, delay may spell death.[22]

The regulations will have perhaps their cruelest effect on those low income women who have serious complicating conditions, such as hypertension, eclampsia, diabetes, congenital heart disease, cancer, sickle-cell anemia, kidney disease and certain respiratory, urinary and neuromuscular disorders. Continuation of pregnancy for women suffering from these diseases carries grave risks for the health of both the mother and the fetus.[23] While the regulations at issue will permit professionals in Title X clinics to disclose the existence of complicating conditions to their patients, they will prevent counseling of abortion as an alternative to carrying a pregnancy to term.[24] As a result, women with serious complicat-

17 The cost of an abortion increases as pregnancy advances. Clinics charge an average of $231 for an abortion at 8 weeks, $400 at 16 weeks and $700 at 20 weeks. The Alan Guttmacher Institute, *Abortion and Women's Health: A Turning Point for America?* 26 (1990). The Court invalidated the second trimester hospitalization requirement in *Akron* because it imposed "a heavy, and unnecessary, burden," more than doubling the cost of "women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure." 462 U.S. at 438.

18 Only 17% of all abortion providers perform abortions after the 16th week of pregnancy. Henshaw, Forrest, & Van Voort, *Abortion Services in the United States, 1984 and 1985*, 19 Fam. Plan. Persp. 63, 69 (1987).

19 In 1985, 82% of all U.S. counties lacked an abortion provider, yet these counties were home to 30% of all women of childbearing years. *See* Henshaw, Forrest, & Van Voort, *supra* n.18, at 65. The difficulty in locating an abortion provider is increasing as fewer doctors are willing to perform abortions for fear of harassment. N.Y. Times, Jan. 8, 1990, at A1, col. 1. South Dakota and North Dakota now only have one abortion provider each and in Wyoming, more than 50% of women go out of state to obtain an abortion. N.Y. Times, June 28, 1990, at A10, col. 5.

20 Even HHS has acknowledged that "[f]or many clients, family planning clinics are their *only* continuing source of health information and medical care." U. S. Dep't of Health and Human Services, *Program Guidelines for Project Grants for Family Planning Services* § 9.4 (1981) (emphasis added). Few women served by Title X have any health insurance which would enable them to afford private care. Of all women aged 18-24, almost 30% have no insurance coverage. Tallon & Block, "Changing Patterns of Health Insurance Coverage; Special Concerns for Women," in *Women, Health and Poverty* 119, 122 (C. Perales & L. Young eds. 1988). Of all women aged 15-44 living below the poverty level, 36% are uninsured. *Id.* The rates are worse for women of color: 21.8% of Blacks and 29.1% of Hispanics are uninsured, compared with 14% of whites. Nsiah-Jefferson, "Reproductive Laws, Women of Color, and Low-Income Women," in *Reproductive Laws for the 1990s* 17, 27 n.46 (N. Taub & S. Cohen eds. 1988). Moreover, "uninsured minorities obtain less physician care and less hospital care, and travel further and wait longer for care, than white uninsured." Dallek, *Health Care for America's Poor: Separate and Unequal*, 20 Clearinghouse Rev. 361, 370 (1986).

21 Recently, Becky Bell, an Indiana high school student, died of a massive infection after she sought an illegal abortion to avoid disappointing her parents by telling them she was pregnant. Carlson, *Abortion's Hardest Cases*, Time, July 9, 1990, at 22.

22 *See Hodgson v. Minnesota*, 58 U.S.L.W. 4957, 4970 (U.S. June 25, 1990) (Marshall, J., concurring in part and dissenting in part) (citing Greydanus & Railsback, *Abortion in Adolescence*, 1 Seminars in Adolescent Med. 213, 214 (1985) (mortality rate 100 times greater from illegal abortion than legal one)).

23 For example, diabetes poses serious risks during pregnancy. Pregnancy-induced diabetes occurs in approximately one to three percent of pregnancies. *Medical Complications During Pregnancy* 41 (G. Burrow & T. Ferris 3d ed. 1988). In addition, approximately 1.5 million women of childbearing age are known to have diabetes. *Maternal-Fetal Medicine* 925 (R. Creasey & R. Resnik 2d ed. 1989). A pregnant woman with diabetes is four times as likely to develop hypertensive disease; she is also more likely to develop infections of a greater severity, injure her birth canal during vaginal delivery, require a caesarian section, and hemorrhage after delivery. *Williams Obstetrics* 600 (J. Pritchard, P. MacDonald & N. Grant 17th ed. 1985). See Brief of *Amici Curiae* the American College of Obstetricians and Gynecologists, *et al.* for a full discussion of the health risks of pregnancy to women with complicating medical conditions.

24 *See* Declaration of Dr. George Morley, President of the American College of Obstetricians and Gynecologists ¶ 17 (228-29JA); Declaration of Prof. Howard Minkoff, Professor of Obstetrics and Gynecology, State of

ing conditions will not learn that their pregnancies pose substantial health risks that may require an abortion to preserve their health or save their life. In addition, the regulations' mandated referral to prenatal care will reinforce the false impression that the pregnancy does not actually threaten their health.

As a result of the Title X regulations' enforced misinformation, low income women who have restricted access to affordable, comprehensive reproductive health care and counseling will be impermissibly coerced to make uninformed, and often dangerous, reproductive decisions. For this reason, the Title X regulations do more than encourage childbirth over abortion: they actively interfere with a woman's ability to decide whether to carry a pregnancy to term.

II. THE REGULATIONS VIOLATE THE FIRST AMENDMENT RIGHTS OF LOW INCOME WOMEN TO RECEIVE INFORMATION FROM HEALTH CARE PROVIDERS PRACTICING AT TITLE X CLINICS.

The regulations hold the first amendment rights of women and their health care providers hostage to a funding scheme requiring the dissemination of inaccurate and distorted information. Through these funding restrictions, the government has impaired the first amendment right of women to receive information about their reproductive health.

It is now well established that the first amendment protects the listener's right to receive information. *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1975); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). As early as its decision in *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court clarified that, in addition to protecting the freedom to speak, the Constitution safeguards "opportunities . . . to acquire knowledge." *Id.* at 482. In keeping with this principle, the Court has struck down a wide

New York Health Science Center ¶ 8 (648A); Declaration of Dr. Allan Rosenfield, Professor of Obstetrics-Gynecology and Public Health, Columbia University School of Public Health ¶ 22 (83a).

variety of government restrictions that offended the "(f)irst amendment right to receive information and ideas." *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)). *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974); *Lamont v. Postmaster General*, 381 U.S. 301, 306-07 (1957); *Thomas v. Collins*, 323 U.S. 516, 534 (1945).[25] The reciprocal nature of the right to receive information derives from the fact that it "is a necessary predicate to the *recipient's* meaningful exercise of his own right of speech, press and political freedom." *Board of Education v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion) (emphasis in original).[26]

In this instance, the right to receive information is a necessary predicate to the constitutionally protected right to reproductive decisionmaking. As the Court declared in *Griswold*, the very first case recognizing the protected nature of the relationship between a patient seeking family planning information and her physician, "[t]he right of freedom of speech and press includes not only the right to utter or print, but the . . . right to receive . . . [information]." 381 U.S. at 482.[27]

25 In these cases, the Court has held unconstitutional government attempts to stem the flow of information in public schools, courts of law, prisons and the mails. The regulations' efforts to suppress vital medical communications in Title X clinics are surely more reprehensible, given that this "blackout" not only curtails the sharing of ideas and information critical to our polity but also directly undermines the health and lives of millions of women.

26 Justice Brennan stated that the listener's right to receive information warrants first amendment protection because "the dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont*, 381 U.S. at 308 (Brennan, J., concurring).

27 Justice White has written that "[t]he self-expression of the communicator is not the only value encompassed by the First Amendment. One of its functions, often referred to as the right to hear or receive information, is to protect the interchange of ideas. Any communication of ideas . . . furthers the purposes of the first amendment." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 806, *reh'g denied*, 438 U.S. 907 (1978) (White, J., dissenting).

Despite the fact that the first amendment "prohibit(s) [the] government from limiting the stock of information from which members of the public may draw," *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783, *reh'g denied*, 438 U.S. 907 (1978),[28] the regulations withdraw abortion counseling and referrals in the context of low income health care from the stock of information that millions of women can receive and cast prenatal care and childbirth as the only option.[29] Therefore, the Second Circuit's conclusion that the regulations were not viewpoint-based, because they limited both "pro and con" advocacy about abortion, *New York v. Sullivan*, 889 F.2d 401, 414 (2d Cir. 1989), ignored the regulations' obvious intent actively to interfere with a woman's decision whether or not to carry her pregnancy to term. As the First Circuit correctly observed,

> It is naive to assert that not talking about abortion to a pregnant woman when discussing her options is value neutral. . . . By discussing only what is best for the unborn child, the counselor has already made the woman's choice. The Government, in restricting the counselor's options to that choice, enforces its choice.

Massachusetts v. Secretary of Health and Human Services, 899 F.2d 53, 72 (1st Cir. 1990) (en banc).[30] By prohibiting a woman from receiving abortion-related information, the regulations violate the Court's admonition, in another first amendment context, that "[i]f there be time to expose through discussion the falsehood and fallacies . . . the remedy to be applied is more speech, not enforced silence." *Linmark Assoc. v. Willingboro*, 431 U.S. 85, 97 (1977) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

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28 *See also Griswold*, 381 U.S. at 482 (the government "may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge").

29 Note, *The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights?* 41 Stan. L. Rev. 401, 402 (1989).

30 For a fuller discussion of the regulations' unconstitutional discrimination on the basis of viewpoint in a public forum, see Brief of *Amici Curiae* the Commonwealth of Massachusetts, *et al.*

Protecting the dissemination of full and accurate medical information from governmental interference is vital. Such information is critical and is already of limited supply, especially to low income women.[31] The pervasive nature of government regulation of medicine, designed to protect the public through ensuring the quality of medical counseling, demonstrates the crucial importance of complete and accurate medical information to our society.[32] All states require that a license be obtained before a doctor can practice medicine, and licensing is contingent upon completion of extensive education and training.[33] In addition, many doctors choose to develop specializations which restrict the availability of specific medical information even further, to a limited few in a given field.[34] While such efforts are intended to improve the

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31 Numerous studies and reports have noted increasing deterioration in access to health care services for low income groups. *See, e.g.*, L.A. Times, July 17, 1990, at A1, col. 5 (noting that the United States infant mortality rate—a prime indicator of the nation's health care access—exceeds 10 per 1,000, placing the United States no better than 20th out of 22 industrial nations in a United Nations survey); Hatlie, *Professional Liability: The Case for Federal Reform*, 263 J. Am. Med. A. 586 (1990) (reporting increased diminution in the availability of health care in the United States and noting that "access problems are most pronounced in the maternal health field").

32 Public health and the practice of medicine are highly regulated by both the state and federal government, including the licensing of health care providers, facility construction, antitrust matters, environmental protection and the development and distribution of drugs. *See generally Health Care Sourcebook, A Compendium of Federal Laws, Regulations and Documents Relating to Health Law*, vols. 1 & 2 (W. Miller ed. 1989).

33 G. Annas, *The Rights of Patients* 252 (2d ed. 1989). Typically, a doctor is required to complete four years of undergraduate education, four years of medical school and four years of clinical education as a resident.

34 If a doctor chooses to specialize in a particular area of medicine, two or more years of additional training are necessary, and certification by a specialty board is required by most institutions. AMA Council on Medical Education, *Future Directions for Medical Education*, 248 J. Am. Med. A. 3225 (1982). *See also* AMA Council on Long Range Planning and Development, *The Future of General Internal Medicine*, 262 J. Am. Med. A. 2119 (1989) (number of primary health care specialists declining rapidly as more doctors are choosing specialization over becoming a general internist, because of higher pay and status).

quality of medical counseling, they also impose costs that necessarily restrict its availability.[35]

Over the past twenty years, the federal government has encouraged low income women and the health facilities in their communities to rely on Title X to support affordable, quality reproductive health care, including abortion counseling and referral. To a large extent, Title X funding has displaced state and local government aid and private funding.[36] Thus, by preventing Title X health care workers from providing their patients with comprehensive and accurate health information about the option of abortion—despite its importance and limited availability—the government effectively places it beyond the reach of most, if not all, Title X patients. For Title X patients, medical advice about the "denied idea" of the option of abortion is not "readily available from the same source in other accessible locations," *Board of Education v. Pico*, 457 U.S. 853, 913 (1982) (Rehnquist, J., dissenting), and will be effectively foreclosed by the federal government.

Enhanced and improved medical information through government regulation is not the only factor defining the health care culture in the United States. The governing principles of medical ethics nationwide require that physicians communicate to the patient full information about her medical condition and treatment alternatives to ensure that the patient

35 The government's control over the practice of medicine also extends to the criminalization of the unauthorized practice of medicine. *See, e.g.*, *Pinkus v. MacMahon*, 129 N.J. 367, 29 A.2d 885 (N.J. Sup. Ct. 1943) (owner of a food store engaged in unauthorized practice of medicine when he diagnosed shoppers' illnesses, prescribed a healthful diet and sold certain vitamins which he claimed had a curative effect); *New York v. Varas*, 110 A.D.2d 646, 487 N.Y.S.2d 577 (2d Dept. 1985) (engaged in unauthorized practice of medicine where the defendant never obtained a license to practice and conducted medical examinations, wrote prescriptions and provided diagnoses).

36 Approximately fifty percent of Title X projects' funding comes from federal sources, with the remainder generated by Medicaid and sliding scale fee payments. *See Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53, 55-56 (1st Cir. 1990) (en banc).

participates meaningfully in her treatment decisions.[37] This is premised on the view that such an approach results in the best medical decisions.

It is unreasonable, in the context of this medical culture, to expect a woman who uses a Title X clinic to anticipate the forfeiture of full health care counseling and her own informed decisionmaking when she walks through the Title X clinic doors. Indeed, one of the many apparent dangers of the regulations is that women entering Title X clinics are not warned that they are about to receive distorted, misleading information unrelated to their individual health needs. Moreover, even if formal warning notices were somehow provided to Title X patients, it would be unreasonable to expect that a Title X patient, or any patient, would meaningfully alter her expectation of the physician-patient relationship to accommodate any disclaimer stating that the clinic cannot mention abortion.[38]

The dangers of the government's censorship campaign become readily apparent when one hypothesizes a situation where the government enacts a regulation prohibiting oncolo-

37 *See, e.g.*, American Medical Association, *Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association* ¶ 8.07, at 31-32 (1989); *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

38 The element of trust and full reliance is crucial within the context of a physician-patient relationship. "The average patient has little or no understanding of the medical arts, and ordinarily has only [her] physician to whom [she] can look for enlightenment with which to reach an intelligent decision." *Canterbury v. Spence*, 464 F.2d 772, 780, *cert. denied*, 409 U.S. 1064 (1972) (D.C. Cir. 1972). Thus a patient relies on her doctor for the accurate, complete and unbiased information she needs to make decisions about her health. *See* Affidavit of Dr. Jay Katz, Professor of Law and Psychoanalysis, Yale University ¶¶ 7-8 (207JA):

> The doctor-patient relationship is based on trust . . . it is recognized by law as a fiduciary relationship. Because patients must be able to rely on their physicians to act in good faith and in their best interest, principles of law and ethics require them to do so.
>
> The physician thus has an obligation to be truthful, to respect the rights of the patient, and to disclose to the patient all pertinent facts regarding the patient's condition and treatment options, including the risks and benefits of each.

gists in federally funded hospitals from counseling cancer patients about the treatment option of chemotherapy, while mandating referrals to facilities which primarily practice holistic medicine. Patients suffering from cancer would either be left unaware of the existence of chemotherapy, or be given the misleading message that chemotherapy was not a medically acceptable treatment option for many forms of cancer—in either case they would be unable to make a fully informed treatment decision.

Thus, the government's censorship of abortion information infringes the most basic first amendment rights of patients of Title X facilities and ignores the Court's admonition that "people will perceive their own best interests only if they are well informed . . . the best means to that end is to open the channels of communication rather than to close them." *Virginia Board of Pharmacy v. Virginia Consumer Council, Inc.*, 425 U.S. 748, 770 (1975).

III. THE REGULATIONS DEPRIVE WOMEN OF EQUAL PROTECTION UNDER THE LAW BECAUSE THEY DISCRIMINATE ON THE BASIS OF GENDER AND UNDULY BURDEN A WOMAN'S FUNDAMENTAL RIGHTS.

The regulations contravene the fourteenth amendment's prohibition on discrimination because they exclusively harm women. As a result of the regulations, women are denied important medical information necessary to make an informed decision about contraception or, if pregnant, about whether to continue a pregnancy. For example, a woman suffering from severe hypertension should be advised by her Title X physician both that the use of oral contraceptives is contraindicated and that pregnancy may threaten her life. In these circumstances, the regulations prevent full disclosure of crucial information to a woman who for health reasons, should consider alternative forms of contraception. *See* 42 C.F.R. § 59.8(a)(4). The Title X physician would be precluded from fully informing her patient that barrier methods

of contraception, with early abortion as a backup if the barrier method fails, are the safest type of contraception.[39]

Women, pregnant and non-pregnant, are the only people directly burdened by the Title X regulations.[40] Moreover, this gender-based burden curtails women's fundamental constitutional rights: a woman's fundamental privacy right to terminate a pregnancy and her first amendment right to receive information.[41]

The Court has held that measures classifying on the basis of gender are unconstitutional unless the party supporting the measure can "carry the burden of showing an 'exceedingly

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39 *See* Tietze, Bongaarts & Schearer, *Mortality Associated with the Control of Fertility*, 8 Fam. Plan. Persp. 6 (1976); The Alan Guttmacher Institute, *Making Choices—Evaluating the Health Risks and Benefits of Birth Control Methods* (1983). The Food and Drug Administration requires manufacturers of intrauterine devices ("I.U.D.'s") to inform physicians that if a woman becomes pregnant with an I.U.D. in place, and removal is difficult, "termination of the pregnancy should be considered and offered the patient as an option . . ." 21 C.F.R. § 310.502(b)(1) (1989). Similarly, a woman who becomes pregnant while using oral contraceptives "should be apprised of the potential risks to the fetus: the advisability of continuing the pregnancy in light of these risks should be discussed." K. Fineberg, J. Peters, J. Willson & D. Kroll, *Obstetrics/Gynecology and the Law* 311 (1984).

40 Because this case involves placing affirmative burdens on all women's constitutional rights, *Geduldig v. Aiello*, 417 U.S. 484 (1974), is not controlling. *Geduldig* sustained the constitutionality of a state disability insurance program that excluded from coverage certain disabilities resulting from pregnancy because the group discriminated against included only pregnant women and not all women.

The program upheld in *Geduldig* is also distinguishable from the regulations at issue because it refused to extend to women a benefit that men could not receive. The Court has established a distinction between "merely refus[ing] to extend to women a benefit that men cannot and do not receive," and "impos[ing] on women a substantial burden that men need not suffer." *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 (1977) (deeming exclusion of pregnant employees sex discrimination under Title VII). Thus, even where a law places affirmative burdens on pregnant women alone, *Geduldig* has no force. *See also* Estrich and Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. Penn. L. Rev. 119, 124 n.10 (1989).

41 Since the regulations discriminate against women in a way that infringes upon their fundamental rights, the regulations violate the equal protection clause and must be subjected to strict scrutiny. *See infra* at p. 25 and note 49.

persuasive justification' for the classification." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981)). *See also Craig v. Boren*, 429 U.S. 190, 197-199 (1976). Classifications based on gender have long been subjected to searching analysis because of the substantial burdens suffered by women when gender stereotypes are imposed on them. *See Mississippi University for Women*, 458 U.S. at 726; *Califano v. Goldfarb*, 430 U.S. 199, 211 (1977) (plurality opinion); *Stanton v. Stanton*, 421 U.S. 7, 14 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion). The Title X regulations impair a woman's constitutionally guaranteed liberty and autonomy by the pernicious strategy of keeping all necessary information from her. This strategy of misinformation, justified by the goal of "promoting childbirth,"[42] perpetuates the outmoded and dangerous notion that a woman's proper function is reproduction.[43] The Court has consistently struck down legislation that perpetuates "fixed notions concerning the roles and abilities of males and females," *Mississippi University for Women*, 458 U.S. at 726, even when their impact has been far less onerous than the effects of these regulations.[44]

42 If the regulations are allowed to stand, a day may come when the government decides to impose burdens on men as well in the interest of "promoting childbirth." For example, the government may decide to mislead men, or withhold information altogether, about contraception so that a sexually active man might father more children.

43 Women have long been perceived as persons whose "paramount destiny and mission . . . [is] to fulfill the noble and benign office of wife and mother." *Bradwell v. Illinois*, 16 Wall. 130, 142 (1873) (Bradwell, J., concurring). People who would restrict women's access to abortion echo the views of Justice Bradley and believe that the only appropriate roles for women are those of mother and housewife. *See* Estrich & Sullivan, *supra* note 40, at 152-53.

44 The Court has struck down: sex-based distinctions determining eligibility for survivors benefits under the Social Security Act, *Califano v. Goldfarb*, 430 U.S. 199 (1977); sex-based admission requirements for enrollments in nursing school, *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); sex-based regulations determining quarters and medical allowances, *Frontiero v. Richardson*, 411 U.S. 677 (1973); sex-based regulations establishing different drinking ages for men and women, *Craig v. Boren*, 429 U.S. 190 (1976); and sex-based regulations determining government benefits, *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975). None of these regulations actually interfered with a woman's constitutional rights much less jeopardized her health or life.

Not only do the regulations impermissibly perpetuate stereotypes about a woman's proper role in society, they also deprive women of equal treatment with respect to the exercise of their fundamental right to privacy. All persons possess a right to privacy protecting certain personal decisions regarding marriage and family life from unwarranted governmental interference.[45] For a woman, this right includes the right to decide whether or not to terminate a pregnancy, with the chance to determine what is best for her given her physical,[46] emotional, economic, educational and family circumstances. In fact, the Court has recognized a woman's right to choose an abortion by striking down a regulation that would have required spousal consent because "it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy . . . ." *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 71 (1976).

45 The freedom of personal choice implicit in the concept of constitutional liberty places beyond the intrusive reach of the government the decision to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); the decision of when and whether to bear children, *see Griswold v. Connecticut*, 381 U.S. 479 (1965); and decisions regarding childrearing and education, *see Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). The freedom to choose the structure of one's family is "deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

46 Over the nine months of pregnancy, a woman's uterus increases 500 to 1,000 times in size, displacing other bodily organs including the heart, appendix and gastrointestinal tract; her resting pulse rate quickens by ten to fifteen beats per minute and her heart may increase slightly in size; and her body weight increases by an average of twenty-five pounds. Even a healthy pregnant woman may experience nausea, vomiting, more frequent urination, back pain, fatigue, insomnia, labored breathing and water retention. *See Williams Obstetrics* 540-42 (J. Pritchard, P. MacDonald & N. Grant 17th ed. 1985).

No regulation in the Title X context infringes on men's privacy rights in a way that is comparable to the regulations' ban on the provision of any information about abortion to women.[47] Similarly, men face no obstacles to their first amendment right to receive medical information critical to decisions regarding their bodies or health. The regulations create two categories of doctor-patient relationships, one which presumptively allows men to receive full medical information and the other which deprives only women from obtaining complete and accurate information about their health.[48] This type of governmental discrimination clearly violates the equal protection clause.

IV. THE TITLE X REGULATIONS AT ISSUE HERE CANNOT SURVIVE STRICT SCRUTINY BECAUSE THE GOVERNMENT LACKS A COMPELLING INTEREST AND THE REGULATIONS ARE NOT NARROWLY TAILORED TO SERVE ANY INTEREST.

The Title X regulations directly interfere with fundamental privacy and first amendment rights of women. Moreover, because the regulations exclusively harm women by burdening their fundamental rights, they also deprive women of equal protection under the law. The Title X regulations cannot survive strict scrutiny because the government can assert no "compelling interest" to justify the burdens placed on wom-

47 Recipients of Title X funds provide family planning services to both men and women. Services for men include sterilization, sexually transmitted disease screening and treatment, condom distribution and general information. *See* Danielson & McNally, *Title X and Family Planning Services for Men*, 20 Fam. Plan. Persp. 234 (1988).

48 This is not a case of disproportionate impact but of exclusive impact because women are the only ones who are affected by the Title X regulations. In *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), by contrast, the veterans' preference upheld by the Court disadvantaged a class comprised of both men and women although the classification disproportionately disadvantaged women. The class affected by the regulations at issue is defined by a biological correlate of gender unlike *Feeney* where the class granted veterans' benefits also consisted of women.

en's privacy and first amendment rights by the regulations, or their denial of equal protection.

In order to safeguard the individual against the invasive power of government, the Court turns its most "searching judicial inquiry" to governmental regulation that intrudes on the fundamental rights of its citizens. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 721 (1989). Thus, the Court has consistently applied strict scrutiny whenever a woman's privacy right to choose abortion is encumbered by substantial burdens. *See Hodgson v. Minnesota*, 58 U.S.L.W. 4957, 4969 (U.S. June 25, 1990) (Marshall, J., concurring); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *City of Akron v. Akron Center for Reproductive Health Inc.*, 462 U.S. 416 (1983); *Roe v. Wade*, 410 U.S. 113 (1973). The Court has also consistently applied strict scrutiny whenever the government intrudes on the first amendment right to receive information. *Griswold v. Connecticut*, 381 U.S. at 482.[49] In addition, strict scrutiny applies whenever legislation places burdens on a fundamental right in violation of the equal protection clause. *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

The central purpose of this "searching judicial inquiry," *Croson*, 109 S. Ct. at 721, into governmental actions that infringe upon constitutionally protected rights and groups is to ensure that such actions serve a stated goal or interest of sufficient importance to justify infringement *and* that the means chosen to effect the goal are closely tailored to serve only the state interest with minimum intrusion upon the individual's protected rights. The regulations at issue here fail in both respects.

First, the overriding governmental purpose for Title X is to promote public health through the provision of family plan-

49 Similarly the Court applies strict scrutiny to other violations of free speech, including discrimination on the basis of viewpoint, *FCC v. League of Women Voters*, 468 U.S. 364, 383-84 (1984), and conditioning federal funding on the relinquishment of first amendment rights to free expression, *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

ning services for low-income clients[50]—a compelling interest. The regulations at issue here also serve the ancillary purpose of encouraging childbirth over abortion. The government seeks to achieve this ancillary goal, however, not simply by providing incentives to childbirth but rather by perpetuating ignorance and denying women information about abortion as a safe, legal alternative to childbirth. In effect, the regulations' purported purpose of promoting childbirth is a pretext for the actual purpose of the regulations[51]—direct interfer-

50 In enacting Title X, Congress intended to establish a program that would provide the poor with comprehensive reproductive health care. During the floor debate in the House, then-Representative George Bush stated, "[m]ost important is that this legislation be recognized . . . as a health care service mechanism . . ." 116 Cong. Rec. H37370 (daily ed. Nov. 16, 1970) (statement of Rep. Bush). The statutory mandate of Title X is expansive:

> to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents).

42 U.S.C. § 300(a) (1982). For a complete discussion of the purpose of Title X, see Brief of Petitioner State of New York, *et al.* and Brief of *Amici Curiae* NAACP Legal Defense and Educational Fund, Inc., *et al.*

51 At least one member of the Court has advocated searching scrutiny of the government's stated purposes as well as the means to achieve those purposes. In *Mississippi University For Women v. Hogan*, Justice O'Connor emphasized that "the mere recitation of a benign . . . purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." 458 U.S. 718, 728 (1982) (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975)).

Similarly, in a first amendment context, Justice O'Connor also suggested that strict scrutiny applies whenever burdens on speech are imposed on the pretext of furthering some general legislative interest: "[i]f . . . a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books . . . the case would clearly implicate first amendment concerns and require analysis under the appropriate first amendment standard of review." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986) (O'Connor, J., concurring).

Justice O'Connor recently observed that the requirement of narrowly tailored regulation is "designed to 'ensur[e] that the means chosen fit' [the] compelling goal so closely that there is little or no possibility that the motive" for a regulatory scheme is illegitimate or unconstitutional. *Metro Broadcasting, Inc. v. FCC*, 58 U.S.L.W. 5053, 5072 (U.S. June 27, 1990) (O'Connor, J., dissenting) (quoting *Croson*, 109 S. Ct. at 493).

ence in the fundamental privacy and first amendment rights of women to make fully informed decisions between abortion and childbirth.[52]

Second, the government's means of banning abortion counseling and mandating referral to prenatal care are not narrowly tailored to serve the goal of encouraging childbirth without impermissibly violating the free speech and privacy rights of women served by Title X programs. The regulations clearly conflict with medical ethics that demand unrestricted communication between a physician and her patient.[53] The government's asserted interest here does not justify the enactment of health regulations that "depart from accepted medical practice," *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. at 431 & 454 (O'Connor, J., dissenting). Rather than being narrowly tailored to encourage childbirth over abortion, the regulations distort the physician-patient dialogue in a way that fundamentally impedes the patient's receipt of viewpoint neutral information and her autonomy in reproductive decisionmaking.

Finally, the Title X regulations also fail to pass muster under the Court's most lenient standard of review, the rational basis standard. As the Court recently reiterated in *Hodgson*, under any analysis, an abortion regulation "cannot be sustained if the obstacles it imposes are not reasonably related to legitimate state interests." *Hodgson v. Minnesota*, 58 U.S.L.W. at 4962 (citations omitted). Because the effect of the regulations' ban on abortion counseling and referral is seriously to endanger maternal health, the regulations' goal of promoting childbirth actually undercuts Title X's overarching public health purpose in a manner that violates medically accepted practice. Any regulation which so clearly

52 As the Court pointed out in *Hodgson*, "[a] State's value judgment favoring childbirth over abortion may provide adequate support for decisions involving [the] allocation of public funds, but not for simply substituting a state decision for an individual decision that a woman has a right to make for herself. Otherwise the interest in liberty protected by the due process clause would be a nullity." *Hodgson v. Minnesota*, 58 U.S.L.W. 4957, 4962 (U.S. June 25, 1990).

53 For a complete discussion of this point, see Brief of *Amici Curiae* the American College of Obstetricians and Gynecologists, *et al.*

departs from commonly accepted medical ethics and practice cannot be rationally related to a legitimate state interest in promoting health and cannot be saved simply because it serves some ancillary purpose.

By analogy, suppose perceiving a serious threat of over-population, the government opted to respond to the crisis by limiting population growth through a program of male sterilization. A federal program of forced sterilization of men would violate a man's right to decide whether or not to have children, and would necessarily be struck down by the Court on privacy and equal protection grounds. *Cf. Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942). However, a government program providing federal funding of the full cost of male sterilizations (but not funding male fertility treatment) and establishing population control clinics for the performance of sterilization on demand would be a possible alternative under prevailing constitutional doctrine. *Cf. Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980). Hypothesize further that an illness breaks out which causes sterility in men only, but can be cured if diagnosed and treated promptly. To further promote population control, the government enacts regulations which prohibit health care professionals in federally funded facilities from counseling men with the illness about its treatment. In this hypothetical, the legitimate goal of promoting population control is pursued by a means which violates an individual's fundamental rights and is a pretext for the unconstitutional purpose of denying men their right to choose whether or not to have children.

CONCLUSION

Amici respectfully urge that the regulations should be invalidated as an impermissible "effort to deter a woman from making a decision that, with her physician, is hers to make." *Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53, 66 (1st Cir. 1990) (en banc) (quoting *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759 (1986)). For all the foregoing reasons, the Court should strike down the Title X regulations as unconstitutional.

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Respectfully submitted,

Sarah E. Burns
Alison Wetherfield
NOW LEGAL DEFENSE AND EDUCATION FUND
99 Hudson Street
12th Floor
New York, New York 10013

John H. Hall
Counsel of Record
Geoffrey H. Coll
Claudia A. Lewis
Randi J. Roberts
Mallika Dutt
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, New York 10022

Attorneys for Amici Curiae

APPENDIX A

INTEREST OF *AMICI CURIAE* ORGANIZATIONS

ABORTION RIGHTS MOBILIZATION is an organization dedicated to implementing and guaranteeing women's right to legal abortion as decreed by the U.S. Supreme Court.

ActionAIDS, in Philadelphia, Pennsylvania, provides ongoing direct services to approximately 400 of the men, women and children with symptoms of HIV disease in the Greater Philadelphia area. Additionally, it provides support and assistance to their spouses, lovers, family members and care givers. Access to comprehensive reproductive health information—including information about abortion and abortion services—can be crucially important to women who have tested positive for the AIDS virus. These women need access to such equitable medical coverage in order to have a true moral choice with regard to one of the most heartbreaking and difficult decisions—that of whether or not to bear a child who may be born with AIDS. Because women at high risk of AIDS frequently discover their own HIV-positive status as a result of giving birth to a child with AIDS, access to comprehensive reproductive health care, including abortion, becomes a matter of paramount importance. For medical, moral and emotional reasons, these women cannot reasonably be required to carry future inadvertent pregnancies to term. Low income and adolescent women, many of whom are people of color, are in particular need of access to the federally funded family clinics that provide comprehensive reproductive health information—including abortion services—as one of their services. Without such access, we can expect a marked increase in both unsafe, illegal abortions and AIDS infection in women and their children.

The **ALL-PEOPLES CONGRESS** (the "Congress"), based in New York City, is a national organization with chapters in communities in major cities whose women members are Black, Latina, Asian, Native American, White, students, lesbians, workers, unemployed, disabled seniors, single heads of households and those on fixed incomes. The Congress supports a comprehensive federal health care program of guaran-

teed reproductive rights, health care, and access to and information concerning safe, legal, affordable abortion. It opposes any restrictions in Title X facilities which would put any obstacles in the way of poor women or deny them information on abortion, birth control, or any other information necessary in order to make informed choices.

The **AMERICAN ASSOCIATION OF UNIVERSITY WOMEN** (the "AAUW"), a network of 135,000 college-educated women, promotes equity for women and girls, education and self-development over the life span and positive societal change. The AAUW supports the right of every woman and girl to safe and comprehensive reproductive health care. AAUW believes that decisions concerning reproductive health care are personal ones, and that the right to make informed decisions should be available to *all* women.

The **AMERICAN HUMANIST ASSOCIATION** (the "AHA") is a nationwide philosophical-lifestance-religious membership organization, founded in 1941. The AHA and its members support reproductive choice and believe that the HHS regulations forbidding the provision of information about abortion in Title X-funded programs can only have a negative effect on women's health and the integrity of counselors.

The **AMERICAN JEWISH COMMITTEE** ("AJC") is a national organization of 40,000 members, founded in 1906 for the purpose of protecting the civil and religious rights of Jews. The AJC believes that this goal can best be accomplished by helping to preserve the constitutional rights of all Americans, including the fundamental right of access to abortion on a voluntary basis.

AMERICANS FOR RELIGIOUS LIBERTY (the "ARL") is a nationwide educational public interest organization, founded in 1981, dedicated to defending religious liberty, reproductive freedom, and the constitutional principle of separation of church and state. ARL regards the restrictions on abortion counseling and referrals under Title X as violative of the counselor-client relationship, of the client's right to

know, of the free exercise of religion, of reproductive freedom, and of the constitutional ban of laws "respecting an establishment of religion."

The **ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND** (the "AALDEF"), founded in 1974, is a national civil rights organization that addresses the critical problems facing Asian Americans, including Asian women utilizing health clinics that are funded under Title X of the Public Health and Human Services Act. AALDEF seeks to improve the quality of life for Asian immigrant women, who constitute the largest sector of Asian women in the United States. AALDEF has assisted the formation of the Asian Women's Center located in New York City, which provides shelter with bilingual services for battered women. AALDEF is committed to defending a woman's right to reproductive choice.

The **ASSOCIATION FOR VOLUNTARY SURGICAL CONTRACEPTION** is a not-for-profit family planning membership organization dedicated to the principle that men and women everywhere should have access to safe and effective voluntary sterilization. The organization, which works in the United States and over 50 other countries, is funded by contributions from individuals, foundations, and by the United States government.

ASSOCIATION FOR WOMEN IN PSYCHOLOGY is a national organization founded in 1969 to promote the issues of women's mental health. The organization's position over the years has been that reproductive choice enhances women's mental health.

AWARE is a community-based, participatory research and educational organization conducting clinical, behavioral, and epidemiological research on women and HIV infection in the San Francisco Bay Area. AWARE findings have been published in scientific journals and have been presented at national and international medical, behavioral and public health meetings since 1985. Access to information about and services providing pregnancy termination services are essential

as unwanted pregnancies may accelerate the progression of HIV infection among women. The pain, suffering, and costs of delivering infants who may themselves be infected and may require extended hospitalization and treatment, until they too die from AIDS, is already a severe burden to health and social service systems in many states.

The **BEVERLY HILLS BAR ASSOCIATION** (the "BHBA") is a voluntary bar association formed on December 2, 1931 that currently has 3,000 members. The members of BHBA practice in and around the City of Beverly Hills, California. BHBA is committed to the protection of individual liberties and to the promotion of respect for the legal system. BHBA believes that a reversal of the landmark decision in *Roe v. Wade* would undermine public confidence in the legal system.

The **BLACK WOMEN'S AGENDA, INC.** is a private organization which aims to improve the status of Black women and their families and supports equal access to reproductive freedom.

The **BRADFORD COUNTY COALITION FOR CHOICE** (the "Coalition for Choice") is a citizen's organization committed to a woman's right to reproductive choice. The Coalition for Choice objects to the gag rule which we feel is unconstitutional.

The **BROOKLYN WOMEN'S POLITICAL CAUCUS** ("BWPC"), one of the local groups which together make up the National Women's Political Caucus, is a bi-partisan organization which has as its goal the election and appointment of progressive women to public office. In order to be eligible for our endorsement, candidates must agree to our four basic principles: choice for all women on whether or not to bear children, support of the Equal Rights Amendment, support of gay rights, and support of public funding for day care. Membership in the BWPC is open to all men and women who live in Brooklyn, work in Brooklyn, or have an interest in Brooklyn.

CALIFORNIA WOMEN LAWYERS (the "CWL") represent the interests of 23,000 women attorneys throughout the State of California. CWL is committed to preserving the fundamental constitutional right to choose and is very concerned by the recent erosions of such rights by the courts. It must be realized that *every* woman in this free country not only has the right to choose to have an abortion, but also has a safe place to get one.

In 1974, the **CANADIAN ABORTION RIGHTS ACTION LEAGUE** (the "CARAL")—then called the Canadian Association for Repeal of the Abortion Law—was formed to support Dr. Henry Morgentaler's challenge of the old abortion law. CARAL supported Dr. Morgentaler's battle politically and financially, and at the same time educated Canadians about the abortion issue so that his challenge to the law would be met by an informed and sympathetic public. CARAL supported clinics operating outside the strict confines of the law as necessary to open up access to abortion services. CARAL grew from a group of 100 people to become a national organization with 25 chapters, thousands of individual members and 100 member organizations. Until January 28, 1988 (when the Supreme Court of Canada declared the law unconstitutional) CARAL lobbied the government to repeal the abortion law. CARAL is now working to keep abortion out of the Criminal Code and to improve access to medically-insured abortion services across the country. Through education and information, CARAL seeks to convince Canadians and their elected representatives that Canada does not need a new abortion law. CARAL is the only national organization working full-time to keep abortion out of the Criminal Code and to protect access to abortion.

The **CENTER FOR LAW & SOCIAL JUSTICE** (the "CLSJ") at Medgar Evers College is a research and advocacy institution created in 1985 by a special appropriation of the New York State Legislature to establish a legally oriented civil rights and social justice institution in New York City. CLSJ conducts litigation and public policy projects on matters involving pressing civil and human rights issues, in such

areas as employment, health care, and housing. Discrimination in these areas has historically plagued the African-American communities CLSJ serves, particularly the women in these communities. These women are the ones who will suffer tremendously should the Title X regulations be upheld. For this reason, CLSJ joins as *amicus curiae* in this consolidated appeal to the United States Supreme Court.

The **CENTER FOR PUBLIC REPRESENTATION** (the "Center") is a nonprofit, public interest law firm. The purpose of the Center is to provide research and training to women, families, and consumers, to speak out on behalf of these such unrepresented groups, and to take on cases to make sure that their interests are served. A large portion of the Center's efforts is directed at advocating for and protecting the rights of women and it feels that prohibiting federally-funded family planning clinics from providing abortion counseling and referrals will have a direct negative impact on the health of the low income women that the Center represents who would no longer receive vital information on reproductive choices.

The **COLORADO WOMEN'S BAR ASSOCIATION** (the "CWBA") is a nonprofit professional association of more than 600 Colorado lawyers and law students. Open to all attorneys regardless of sex, the CWBA was founded in 1977 to promote the highest standards of the legal profession, to advance justice, to promote, advance, and protect the interests and welfare of women, and to pursue these goals through appropriate legal, social and political action. The CWBA supports reproductive freedom and opposes any effort to restrict the access of women to information necessary to make fully-informed decisions about their health and their lives.

The **COMMITTEE FOR HISPANIC CHILDREN AND FAMILIES, INC.** (the "CHCF") feels that the Title X regulations as they now stand are detrimental to the health of low income Latina women. Many times, Latina women are faced with no other safe alternatives but to use Title X funded clinics. Not allowing Title X funded clinics to give all the information that women need to make reproductive choices is equal to saying they are not allowed to have a choice. Those at CHCF, a founder of the Latino Roundtable on Women's Health and Reproductive Rights, are extremely concerned about the health of poor women.

The **COMMITTEE TO DEFEND REPRODUCTIVE RIGHTS** ("CDRR") is a San Francisco community-based organization with 1,000 members throughout California and several other states. For ten years, CDRR has been dedicated to ensuring women's reproductive freedom by engaging in public education issues concerning reproductive rights and the freedom of all women, including young women.

CHOICE (Concern For Health Options Information, Care & Education) has for the past two decades been a respected and reliable source of information, education and counseling regarding issues of reproductive health. CHOICE is committed to the principle that all people, regardless of age, race, color, gender or income, are entitled to be fully informed of their medical options and to make reproductive or family planning choices free of governmental or private coercion.

DISABLED IN ACTION OF METROPOLITAN NEW YORK is a non-profit civil rights organization advocating for the needs of all disabled individuals, including disabled women of all economic and educational backgrounds, regardless of age, who may choose for whatever reason to have an abortion.

EQUAL RIGHTS ADVOCATES, INC. ("ERA") is a San Francisco-based public interest legal and educational corporation dedicated to working through the legal system to end discrimination against women. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. ERA believes that the right to control one's reproductive life is fundamental to women's ability to gain equality in other aspects of society.

The **FEDERATION OF FEMINIST WOMEN'S HEALTH CENTERS** (the "Federation") is a group of women-controlled clinics in the United States that provide birth control and abortion to women. The Federation clinics have also assisted pregnant women in locating adoptive parents. Its clinics provide inexpensive, outpatient abortions, and thousands of lower-income women utilize our services. If the new Department of Health regulations were to go into effect, its abortion clinics would not be able to receive referrals from Title X clinics, thus significantly limiting its ability to provide women with the safe, legal health care they seek. The Federation of Feminist Women's Health Centers strongly support the provision of complete information to women with problem pregnancies to enable each woman to reach her decision about her pregnancy with full informed consent.

The **FEMINIST INSTITUTE** promotes social change that ensures women's autonomy and independence. Its women's health policy and pro-choice projects promote public policies that ensure women's control over their own bodies. The Feminist Institute is concerned that, as women become free from subjugation to patriarchal control within the family, they in turn, not become subject to state control of their reproduction. Control over one's own body without intervention or restriction by the government is fundamental to the exercise of personal autonomy.

The **HISPANIC HEALTH COUNCIL** is a non-profit organization working with low-income Hispanic families, youth and women. For 12 years we have actively advocated on behalf of Puerto Rican women, offering health, education, life skills training, and mutual support in an effort to enhance self-sufficiency and help women regain control over their lives. Most of our clients depend on Medicaid; therefore, Title X regulations would be one more attack on those women who are the least able to respond through institutional and other means.

The **HUMAN RIGHTS CAMPAIGN FUND** (the "Campaign Fund") is a national political and advocacy organization representing lesbian and gay Americans in Washington, D.C. Since its founding ten years ago, the Campaign Fund has been committed to working toward full civil rights for lesbians and gay men and ultimately for all Americans. In pursuit of this goal, the Campaign Fund is interested in any governmental actions—legislative, judicial, or administrative—that could impact on civil rights. In addition, its Lesbian Action Agenda is devoted to addressing the political and policy issues of the lesbian community. A survey of its lesbian membership revealed that reproductive freedom is one of three top priority issues for lesbians.

The **INSTITUTE FOR WOMEN'S POLICY RESEARCH** ("IWPR") is an independent, nonprofit, scientific research institution established to respond to the need for women-centered, policy-oriented research. IWPR conducts research that addresses the full spectrum of issues that impact on women's lives—with sensitivity to and consideration for diversity based on race, ethnicity, and class. The focus of the Institute's research is both national and international in scope. In all aspects of its endeavors, IWPR is committed to expanding access, strengthening relationships, and fostering partnerships which strengthen the economic, social, and political well-being of all women. IWPR gives its full support to the amicus curiae brief in these cases. IWPR urges the Court to uphold women's right to reproductive choice because, among other reasons, women's right to reproductive choice is a key element in their ability to achieve economic equity.

The **JESSIE SMITH NOYES FOUNDATION** (the "Foundation") is a private foundation committed to preventing irreversible damage to the natural systems upon which all life depends. The Foundation makes grants in the closely interrelated areas of environment and population. The Foundation, therefore, believes that reproductive rights are essential to achieving a balance between environment and population, as well as to the individual dignity of women.

The **LEAGUE OF WOMEN VOTERS OF THE UNITED STATES** (the "LWVUS") is a nonpartisan, nonprofit mem-

bership organization with members in all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands. The LWVUS strongly believes that public policy in a pluralistic society must affirm the constitutional right of privacy of the individual to make reproductive choices. The LWVUS has adopted the protection of the right of privacy in reproductive choices as one of its issues for emphasis during its 1990-92 national program.

MADRE is a national women's friendship association that sees the connections between U.S. policy and its effects on women and children in the U.S., Central American and the Caribbean. MADRE's work includes programs which address healthcare and childcare issues which affect women's daily lives. We support reproductive freedom and quality affordable healthcare for all women. We know that poor women and women of color are most affected by restrictive policies. We therefore sign on to the amicus brief in its opposition to the regulations imposed by Title X.

MEN OF ALL COLORS TOGETHER/NEW YORK ("MACT/NY") is a multiracial organization of gay men committed to addressing and combatting racism and discrimination in the lesbian and gay male community, and to providing an environment for interracial relating among gay men. In addition, MACT/NY is committed to being a vital part of the feminist movement, combatting sexism and continuing to be integrally involved in the struggle for reproductive choice and the equality of women.

MOBILIZATION FOR YOUTH HEALTH SERVICES, INC. employs over 600 women, the overwhelming majority of whom are of Caribbean, South American and Asian origin. Given the current American social reality, nearly all of these women suffer from relatively low wages, limited choice, and other disadvantages. If deprived of certain entitlements for all women—entitlements whose elimination more affluent women may more easily endure given their resources—poorer women often will have no other recourse than to use unsafe means within their economic grasp to continue the current

status quo and thereby be frustrated by the loss of the entitlement.

The **MS. FOUNDATION FOR WOMEN** (the "Foundation"), the only national, multi-issue, public women's fund in the country, was founded in 1973 to support women's efforts to govern their lives and influence the world around them. We fund and assist women's self-help organizing efforts and pursue changes in public consciousness, law, philanthropy and social policy. The Foundation directs its resources to activities that break down racial, class, age, sexual orientation and cultural barriers. Through its Reproductive Rights, Health and AIDS Project, the Ms. Foundation is committed to protecting the reproductive rights for all women, especially women of color, low-income women and adolescent women. The Title X regulations threaten the rights of these women and therefore should be considered unconstitutional.

MY SISTER'S PLACE, Yonkers, New York, a refuge from violence in the family, is a non-profit organization founded in 1978. My Sister's Place is dedicated to ending violence and abuse in the lives of women and their children. It provides services to 1,000 women each year. Most of these women are on public assistance. My Sister's Place feels that accessibility to information regarding abortion counseling and referrals to women is imperative to its attempt at empowering battered women and giving them control over their lives—especially in the area of reproductive freedom.

The **NATION INSTITUTE** (the "Institute") is a non-profit organization whose purpose is to undertake and support research, conferences, seminars, publishing ventures, educational programs, and other activities with an emphasis on civil liberties, social justice, and peace and disarmament. The Institute has a fundamental commitment to those rights protected by the speech, press and assembly clauses of the First Amendment. And, since it firmly believes that the best defense of free speech is the exercise of that right, the Institute takes a special interest in extending the audience (and thus enhancing the influence) of independent journals of

political commentary, investigative reporting and dissenting opinion.

The **NATIONAL ABORTION RIGHTS ACTION LEAGUE** ("NARAL"), has over 400,000 members in 41 state affiliates and the national organization. Founded in 1969, NARAL is the largest national organization dedicated solely to keeping abortion safe, legal and accessible. NARAL recognizes that guaranteeing women the full range of reproductive choices is critical to women's autonomy and equality.

The **NATIONAL ASSOCIATION OF COMMISSIONS FOR WOMEN** (the "NACW"), a non-partisan organization, is a membership organization composed of regional, state, county and city commissions created by government to improve the status of women. It was founded in 1970 to give a national voice to commissions for women to create an exchange of information and ideas among government, the private sector and women's organizations. NACW is committed to eliminating discrimination on the basis of sex, race, age, religion, national origin or marital status in all phases of American society furthering legal, social, political, economic and education opportunities for women and promoting the dissemination of information and providing counsel on opportunities for the effective participation of women in the private sector.

The **NATIONAL CENTER FOR LESBIAN RIGHTS** (the "NCLR," formerly the Lesbian Rights Project) is a non-profit public interest law firm founded in 1977 and devoted to the legal concerns of women and men who encounter discrimination on the basis of their sexual orientation, including in the area of reproductive rights. NCLR is a national organization with a strong commitment to increasing access to reproductive rights for women, specifically for lesbians, and has demonstrated that commitment through both litigation and community education. NCLR has appeared as counsel and *amicus curiae* in numerous cases on behalf of women who have been denied access to their reproductive rights, or whose reproductive rights have been restricted by the state.

The **NATIONAL COALITION AGAINST DOMESTIC VIOLENCE**, in commitment to the struggle for reproductive choice and the equality for all women, is signing on as an *amicus curiae* on the brief filed in the consolidated appeal of *Rust v. Sullivan* and *New York v. Sullivan*. This brief challenges the constitutionality of Title X regulations that would prohibit federally-funded family planning clinics from providing abortion counseling and referrals. Every woman regardless of her race or economic level has the right to free speech and the right to make an informed decision about private, medical matters. The Title X regulations would deny this right to women who need it most, low income and adolescent women, many of whom are women of color. These regulations should be deemed unconstitutional as they jeopardize the reproductive health of the 5 million women who utilize federally-funded family planning clinics each year.

The **NATIONAL COUNCIL OF JEWISH WOMEN** (the "NCJW"), founded in 1893, is the oldest Jewish women's volunteer organization in America. NCJW's 100,000 members in more than 200 sections across the United States keep the organization's promise to dedicate themselves, in the spirit of Judaism, to advancing human welfare and the democratic way of life through a combination of social action, education and community service. NCJW is concerned with individual rights and its National Resolutions include working for "services which provide family planning and reproductive choice, regardless of age and ability to pay, while assuring confidentiality."

The **NATIONAL LATINA HEALTH ORGANIZATION** was founded because as Latinas its members felt very strongly that they themselves needed to do something about the quality of their health, about the injustices, neglect and racism they as a group have suffered. Their health issues have not been addressed. Lack of awareness on the part of the medical profession and the language barrier have had a major impact on their access to medical care. Restriction of services and information related to abortion and other reproductive services will jeopardize their health and their lives

even further. The National Latina Health Organization must have all information and services available to them so they can make knowledgeable, educated and healthful choices for themselves.

The **NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY** (the "Center") is a nonprofit national advocacy group based in Washington, D.C. The Center monitors and enforces federal laws to aid homeless and poor persons. In addition, the Center promotes public policies designed to aid homeless and poor persons. The Center believes that further restrictions on federal funding of family planning programs will unfairly and disproportionately burden homeless and poor women. Because the Center also believes that these restrictions are illegal, it joins in opposing them.

The **NATIONAL LAWYERS GUILD** (the "Guild") is a national organization representing over 8,000 lawyers, legal workers, law students and jailhouse lawyers in over 200 chapters throughout the United States. Since its founding in 1937, the Guild has provided legal support to virtually every struggle in this country for economic, social and political justice. The Guild is firmly committed and is working actively to protect the rights of all people, and specifically the right of every woman to have access to all forms of family planning, including safe and legal abortion.

The **NATIONAL MEDICAL ASSOCIATION**, founded in 1985, represents 16,000 Black physicians in the United States, including Puerto Rico and the Virgin Islands. The National Medical Association seeks to foster the enactment of just medical laws and to educate the public concerning all matters affecting public health, especially matters affecting the socio-economically disadvantaged and the health care of women. The National Medical Association supports the common struggle for reproductive choice and the equality of women.

The **NATIONAL ORGANIZATION FOR WOMEN** ("NOW") is a national membership organization of approximately 270,000 women and men in about 750 chapters

throughout the country. It is a leading advocate of women's equality in all areas of life. NOW has as one of its priorities the preservation of the right to reproductive freedom, including abortion.

The **NATIONAL REPUBLICAN COALITION FOR CHOICE** (the "Coalition") is a political committee founded to identify, organize and mobilize pro-choice Republicans, to help elect pro-choice Republicans in primary and general elections and to promote the "choice" position as the official position of the Republican Party. In this way, the Coalition works to ensure the rights of *all* women to reproductive freedom.

The **NATIONAL WOMEN'S HEALTH NETWORK** (the "NWHN") is a public interest organization whose membership, comprising 10,000 individuals and 400 organizations representing 500,000 women, seeks to give women a voice in the health care system of the United States. The NWHN supports women's rights to have complete control over their bodies, which must include the right to make decisions to use contraception, to bear children or to end a pregnancy. The NWHN serves as an advocate for women whose voices are not heard in the creation of health policies at the federal level.

The **NATIONAL WOMEN'S LAW CENTER** (the "Center") is a Washington, D.C.-based legal organization which has been working since 1972 to advance and protect women's legal rights. The Center's primary goal is to ensure that public and private sector practices and policies better reflect the needs and rights of all women. The heavy burden of the Title X prohibition on abortion counseling and referral falls on the reproductive rights and health of poor women who are disproportionately women of color.

The **NATIONAL WOMEN'S POLITICAL CAUCUS** (the "NWPC") is a nonprofit organization supporting the appointment and election of women to public office. NWPC also supports legislative initiatives at the state and national levels to ensure fairness and equity for all Americans.

NEW DIRECTIONS FOR WOMEN is committed to publishing the many voices of feminism. It believes the diversity of the women's movement must be seen as one of its strengths. New Directions for Women is a national feminist periodical written for feminists and committed to reaching out to those not yet dedicated to a feminist future. New Directions for Women believes that when we understand the pervasive force of sexism, we will act to effect change.

NEW JEWISH AGENDA ("NJA"), founded in December 1980, has chapters in more than 45 American cities. NJA's 5,000 members work to foster traditional progressive Jewish values and to promote Jewish participation in progressive coalitions. In keeping with Jewish tradition, NJA will fight to keep abortion safe and legal for all women. It will work to eliminate the obstacles which prevent women, especially poor women, from gaining control over their reproductive lives.

NEW YORK ASIAN WOMEN'S CENTER is a community-based program to provide direct services for Asian battered women and sexual assault survivors and to educate and organize the public to work towards eliminating the problem of violence against women in the Asian communities. It believes that women have the right to make informed choices about every aspect of their lives, including choices concerning health care. It also believes that women, particularly women of color and poor women, must have true access to quality affordable services in order to exercise their right to make an informed decision.

The **NEW YORK CITY COALITION FOR WOMEN'S MENTAL HEALTH** is an educational institution comprised of institutions, individuals, consumers, advocates, and mental health professionals. Our educational purpose is to ensure that women of all classes of society are fully informed and provided with information that is germane to their mental health needs.

The **NEW YORK COALITION OF 100 BLACK WOMEN** was organized to act as an advocate for Black women. It provides a forum to explore issues of concern to Black women

and then a vehicle to act upon them. In doing so the Coalition encompasses the full spectrum of empowerment in every arena, including pro-choice issues.

The **NEW YORK PRO-CHOICE COALITION** (the "Coalition") was founded by Merle Hoffman in 1985 as an umbrella organization of individuals and groups committed to the maintenance of legal, safe abortion. The Coalition's purpose is to ensure for all women: safe, legal, accessible abortion; reinstatement and/or continuance of Medicaid funding for abortion nationally; availability of and access to safe, effective birth control and information concerning their reproductive lives and health; the right to choose the timing of motherhood by ensuring the provision of adequate prenatal care and the elimination of sterilization abuse. As an organization committed to women's well-being and the absolute right of women to control their own reproduction, the Coalition is greatly alarmed at the possibility that Title X regulations eliminating abortion counselling from federally funded clinics may be upheld as constitutional.

The **NEW YORK STATE REPUBLICAN FAMILY COMMITTEE** is an educational advocacy organization devoted to promoting policies that foster maximum choice, particularly in matters of health. Founded in 1984, the Committee has over 600 Republican party members, 99 percent of whom reside in New York State. Its membership includes lawyers, health care professionals, business people, educators, philanthropists, and numerous civic and political leaders.

NEW YORK UNIVERSITY LAW WOMEN is an organization committed to promoting an understanding of issues that are of importance to women. We support strongly all measures which promote the health of women, the maintenance of the fundamental right of reproductive choice, the protection of the right of bodily autonomy, and the equality of women.

NEW YORK WOMEN IN CRIMINAL JUSTICE is an organization of women whose members include police, probation and corrections officers; judges, attorneys and social

workers; others who work in the criminal justice system; and inmates and ex-offenders. It strongly objects to regulations that bar the provision of information about abortion in federally-funded family planning clinics. The overwhelming majority of women in prison are low income women who rely on federally-funded family planning clinics for their reproductive health and medical needs; these regulations preclude the dissemination of information necessary for them to make fully informed decisions on abortion, and effectively limits their access to affordable abortion providers. The organization supports the right of women to choose abortion, a right which should not be restricted only to those women who can afford family planning.

The **NORTHWEST WOMEN'S LAW CENTER** (the "Law Center") is a private non-profit organization in Seattle, Washington, that works to advance the legal rights of women through litigation, education, legislation and provision of information and referrals. Protecting women's freedom of reproductive choice is one of the Law Center's priority issue areas. The Law Center has participated in numerous cases involving reproductive rights before the U.S. Supreme Court and other courts both within and outside Washington State.

The **NOW LEGAL DEFENSE AND EDUCATION FUND** ("NOW LDEF") is a non-profit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination, secure equal rights, and preserve reproductive options under law.

The **OLDER WOMEN'S LEAGUE** ("OWL"), a national organization of 20,000 members is committed to achieving economic and social equity for midlife and older women. OWL believes that women have a right to stay in control of their lives from birth to the end of their lives. Accordingly, OWL believes in a woman's right to reproductive freedom.

The **ORGANIZATION FOR OBSTETRIC, GYNECOLOGIC, AND NEONATAL NURSES** ("NAACOG") is the professional nursing organization for 24,500 OGN nurses. Established in 1969, NAACOG members are nurses and allied health care professionals who practice throughout the United States and its territories, Canada, Germany, and Korea. NAACOG represents the interests of its members whose common concern centers around access to care and quality of care for women, infants, and their families.

The **PATHFINDER FUND** ("Pathfinder"), founded in 1957, is dedicated to ensuring the availability of family planning services for those in need throughout the developing world. Pathfinder's activities include exploring new service delivery mechanisms, building local institutions, training providers, and providing contraceptive supplies. In both the United States and overseas, it addresses public policy issues that affect the availability of safe and effective family planning services.

The **PEMBROKE CENTER FOR TEACHING AND RESEARCH ON WOMEN at Brown University** funds fellowships to support national and international scholars whose research focuses on gender. The Brown Undergraduate Women's Studies concentration is also housed at the Center. The Center believes that every women, rich and poor alike, deserves the right to make fully informed decisions regarding her body. We as a society cannot revert to the days of illegal abortions with the devastating results for women, especially poor women. Health care is a right of all citizens.

PROJECT CHOICE: AIDS EDUCATION FOR WOMEN OF COLOR ("Project Choice") addresses the problem of women who are at high risk of AIDS. Because the child of an HIV positive woman has a 33-50% chance of becoming HIV positive in utero, such women need the right to make a choice about continuing their pregnancy. Project Choice believes it is important that women have control of their

reproductive lives and have access to abortion, especially when they are at risk of passing disease on to their children.

The **PROJECT ON WOMEN AND DISABILITY** is an organization of women committed to ending the oppression of sexism and disability discrimination. Its goals are to provide training and organizing events and activities to encourage women with disabilities to take leadership in the women's movement and the disability rights movement. It is particularly focused on reproductive rights and in gaining control for all women over procreation and parenting.

The **QUEEN'S BENCH BAR ASSOCIATION OF THE SAN FRANCISCO BAY AREA** ("QB") is the oldest women's bar association in Northern California. It was founded in 1921 for women attorneys who were not accepted into the local bar associations. Since then, it has grown into an organization that welcomes both women and men members. Among its many goals and objectives are the preservation and protection of the United States Constitution and the rights found within it including the protection of freedom of expression and the right to reproductive choice.

RACISM AND HOMOPHOBIA IN THE MEDIA PROJECT ("RHIM") is a group of Lesbian and Gay activists working to improve the images of Gay and Lesbian People of Color in the media. Stressing the need for positive images and knowledgeable reporting, RHIM is working to fight racism and other forms of prejudice and discrimination, wherever they restrict a person's freedom or capabilities.

RADICAL WOMEN, founded in 1967, is an international, multi-racial organization of working women and students dedicated to the causes of women's equality and radical social change, and has been fighting for unrestricted abortion rights since the organization's inception. Over the years Radical Women has continued to work on the abortion issue, particularly as the issue affects poor and working women and women of color. These are the women who suffer most from unwanted pregnancies, who die most often from botched, illegal abortions, and who can least afford unwanted chil-

dren. Radical Women branches across the United States have been instrumental in organizing clinic defenses, forums, and petition campaigns to counter attacks on abortion rights.

The **RAINBOW LOBBY, INC.** is a grassroots citizens lobby based in Washington, D.C., with over 200,000 members and supporters nationwide. The organization lobbies primarily on legislation regarding democracy and election reform, and has launched a legislative campaign to improve the quality of the 1992 presidential elections in the areas of candidate selection, debates, and voter registration. The Rainbow Lobby is committed to removing the political and legal barriers that keep progressive, pro-choice positions from being expressed in the electoral arena and in public policy.

REPRODUCTIVE HEALTH SERVICES ("RHS") is a not-for-profit corporation with its principal place of business in St. Louis, Missouri. RHS is a federal tax-exempt organization under § 501(c)(3) of the Internal Revenue Code. It provides a full range of reproductive services to its client population, including pregnancy testing, birth control, abortion and a full range of adoption services. It presently provides approximately 50% of all abortions performed annually within the State of Missouri. RHS firmly believes that the challenged regulations clearly and punitively violate the constitutional rights of women seeking to make educated choices about reproduction and that the challenged regulations have a disproportionately adverse impact upon indigent women, who are often in the greatest need of counseling and advice.

The **SAN FRANCISCO WOMEN LAWYERS ALLIANCE** is a progressive, activist bar organization, founded in 1983. It is a grass roots organization; the general membership decides what issues are addressed and how they are addressed. Members have the opportunity to make a significant impact on issues affecting women. It prides itself on its ability to act on current women's issues with promptness and timely efficiency.

SANTA FE HEALTH EDUCATIONAL PROJECT is interested in the outcome of this case because it is the

founder of the Coalition for the Protection of Reproductive Rights in New Mexico and feels women's reproductive rights are threatened. The purpose of the Coalition for the Protection of Reproductive Rights is to generate discussion and widen understanding of reproductive health issues. These include: health information, contraception, assistance in dealing with unwanted pregnancies and the right to the choice of whether to bring a pregnancy to term or not, pre-natal care and day care. With such rights being threatened and access to services and information, especially regarding abortion being reduced, the present is a critical time to mobilize.

The **SEX INFORMATION AND EDUCATION COUNCIL OF THE U.S.** ("SIECUS"), is a twenty-five year old national not-for-profit organization headquartered in New York. SIECUS affirms that sexuality is a natural and healthy part of living and advocates the right of individuals to make responsible sexual choices. SIECUS provides information services to professionals, students, and members of the general public across the United States. SIECUS deplores any attempts to undermine women's reproductive health rights. The SIECUS Board of Directors has passed a position statement supporting the right to choose abortion, which states in part, "SIECUS believes a woman is entitled to have full knowledge of alternatives available to her and to have complete and unbiased information and counseling concerning the nature, the consequences. and the risks, both of the abortion procedure, and of pregnancy and childbirth." SIECUS believes that the February 1988 regulations would deny women the right and the ability to make responsible choices.

The **SOUTHERN CALIFORNIA WOMEN'S LAW CENTER** (the "Law Center") was established in 1989 as the first law center in Southern California solely devoted to addressing the civil rights of women and girls. The Law Center has identified the following priorities for its work: reproductive rights, sex discrimination in employment, sex discrimination in education, family law, domestic violence and child care. Protection of the right to reproductive freedom contained in the federal Constitution, which, by definition, must include

access to information concerning abortion services or referral, is one of the most significant legal issues facing women in Southern California, as well as the rest of the country.

STUDENTS AND YOUTH AGAINST RACISM is a national organization based in New York City with chapters nationwide whose women members include students and youth from many communities—Black, Latino, Asian, Native American, White, lesbian, disabled, working, unemployed, poor and heads of households. It organizes against racism and all forms of discrimination in this society. It strongly holds that full reproductive rights and quality health care is the right of all young people and that access to and information about safe, legal, affordable abortions and birth control must be guaranteed and available to all youth, with Medicaid funding for those who need it.

STUDENTS ORGANIZING STUDENTS ("SOS") is a nationwide student organization committed to reproductive freedom and full reproductive rights for all women. Currently, nearly 80% of all women who obtain abortions fall between the ages of 15 and 29; this age group of young women makes up our growing constituency through which we are advancing the reproductive freedom movement. SOS organizes and mobilizes junior high, high school and university students on the state, local and campus levels. To date, S.O.S., in less than a year of existence, has established chapters and affiliates on over 130 campuses throughout the nation. S.O.S. does not view abortion as a single issue, but as part of a broad health and reproductive rights agenda that includes freedom from sterilization and reproductive abuses, access to birth control and comprehensive sex education, adequate pre- and post-natal care and childcare, AIDS education and activism, parenting and reproductive rights for lesbian women and gay men, and free abortion on demand. S.O.S. opposes all attempts, whether by the Supreme Court, the President, the United States Congress, state legislatures, or anti-woman/anti-choice organizations to strip women of their rights to full reproductive freedom. It views all women's freedom to full reproductive choice as its goal; without full

reproductive freedom for all women, regardless of race, creed, color, financial situation or sexual orientation women are not yet free.

The **TUCSON WOMEN'S COMMISSION** was founded in late 1975 by the mayor and council of the City of Tucson to assist women in attaining full equality of opportunity in all aspects of life. The Tucson Women's Commission maintains that the public policy in the best interest of women is to support a full range of options, information, and services so that every woman has the ability to make her own decision about when, whether, and under what conditions to bear a child.

The **UNION OF AMERICAN HEBREW CONGREGATIONS** ("UAHC") represents over 1.3 million Reform Jews and 850 congregations across the United States. The National Federation of Temple Sisterhoods ("NFTS") represents a network of 100,000 women of Reform Judaism in over 600 local Sisterhoods throughout the United States. The Central Conference of American Rabbis ("CCAR") is the major body of approximately 1500 Reform rabbis. Throughout the history of these organizations, they have steadfastly maintained the principles of freedom of speech, freedom of religion and women's rights, believing that the free exercise of one's constitutional rights is essential to the preservation of American democracy. The UAHC, NFTS and CCAR join this brief as *amici curiae* to advocate a woman's right to be informed of all of her reproductive options in the case of an unexpected pregnancy. The governmental coercion or constraint of the information given by a reproductive health worker not only violates the freedom of expression of the counselor, but also denies millions of poor women the opportunity to make an educated choice based upon their own personal religious beliefs and moral guidelines.

UAW/DISTRICT 65 was founded in 1933 among workers in small dry goods establishments on Manhattan's Lower East Side. District 65's reputation as a front-liner in social struggle goes back to anti-fascist activities in support of

Republican Spain and continues through the Scottsboro Boys trial, Selma, Birmingham and Howard Beach.

The **UNITARIAN UNIVERSALIST ASSOCIATION** is a voluntary religious association of 1,000 congregations in the United States and abroad dedicated to the principles of a free faith, the right to an individual conscience, and to the promotion of the inherent worth and dignity of every person. The Unitarian Universality Association has long advocated the right of every woman to decide whether she should bear a child. It believes that the issue of abortion is morally complex and thus must be decided by each individual and must remain a legal option. The Unitarian Universality Association firmly believes that circumscription or prohibition of the right to terminate a pregnancy by qualified medical practitioners is an affront to human life and dignity. In the last two decades, the Unitarian Universality Association has repeatedly affirmed its belief that a woman of any age or marital or economic status has the right to have an abortion upon medical/social consultation of her own choosing.

The **UNITARIAN UNIVERSALIST WOMEN'S FEDERATION** ("UUWF") is an independent organization for Unitarian Universalist women that works for a world of justice and equality in which *all* women are respected and their worth and dignity recognized. The UUWF mission, and its work, are built on the principles of free faith, the right to an individual conscience, and the promotion of the inherent worth and dignity of every person. For more than 15 years, the UUWF has affirmed the right of any woman of any age or marital or economic status to gain information and make her own choices about family planning and to have an abortion at her request upon medical/social consultation of her choosing.

The **UNITED CHURCH BOARD FOR HOMELAND MINISTRIES**, founded in 1957, with roots reaching back to the anti-slavery movement in 1846, has strongly endorsed a woman's right and responsibility to a full range of reproductive options. The organization has been particularly con-

cerned that poor women have the same range of options as women who can afford medical care. It, therefore, is dismayed at the possible prohibition of abortion counseling and referrals in federally-funded clinics.

The **UNITED SYNAGOGUE** is an association of approximately 800 congregations in the United States and Canada.

VOICES IN ACTION, INC. is the non-profit international organization of incest and child sexual abuse survivors and pro-survivors dedicated to prevention and recovery through networking support and education.

VOTERS FOR CHOICE is a national, independent, bipartisan, and pro-choice political action committee. In order to preserve access to safe and legal abortion for all women, Voters For Choice helps to elect pro-choice candidates to federal and state level public offices.

The **WOMAN'S LAW PROJECT** ("WLP") is a nonprofit feminist legal advocacy organization dedicated to advancing the legal and economic status of women. The WLP believes that the right to reproductive choice is an essential component of women's ability to play an equal role with men in this society and has engaged in extensive litigation and public education designed to protect women's legal right to abortion. Since its founding in 1974, the WLP has challenged in the courts a wide variety of state statutes designed to restrict abortion rights, including the Pennsylvania statute invalidated by this Court in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

The **WOMEN AND AIDS COALITION** feels that safe, legal abortion is absolutely essential in our pluralistic, troubling society. The increasingly compromised immune system of so many of our citizens, women particularly, demands that health care providers help to offer the safest medical options at our disposal.

WOMEN FOR RACIAL AND ECONOMIC EQUALITY ("WREE"), founded in 1977, is a national organization with local chapters and members-at-large throughout the United

States. WREE's program is the Women's Bill of Rights, a statement of the demands that will enable women to achieve equality. The goals of WREE include eliminating discrimination against women in every area of life and eliminating the racism in our society that affects their lives, particularly of African-American women and other women of color. A key point in WREE's Women's Bill of Rights is "the right to reproductive freedom including federally-funded birth control and abortion upon demand, sex education, and an end to experimentation and sterilization abuse."

The **WOMEN-IN-CRISIS COMMITTEE** of the Episcopal Diocese of Massachusetts provides education networking, and advocacy regarding women's issues, particularly crisis issues, and gives grants to secular agencies which serve women in crisis. The Committee has been active in pro-choice work since 1983, with particular concern for justice issues such as public funding.

WOMENSPACE is a non-profit organization that works to advance opportunities and enhance the well-being of women in the Greater Cleveland community. WomenSpace reaffirms its commitment to the right of every woman to determine for herself the issues of family planning and reproduction.

WOMEN USA is a national organization dedicated to research, education and activities related to the impact of public policies on the status of women, including such issues as equal rights, participation and representation in policy-making, employment and education opportunities, voter registration, population and family planning services, environment and development, and other policies, practices and programs affecting women and girls.

WOMEN'S BAR ASSOCIATION OF ILLINOIS ("WBAI") was founded in 1914 for the purpose of promoting and fostering the interests and welfare of women and women attorneys and to maintain the honor and dignity of the legal profession. WBAI's 1000 members have long campaigned for individual rights and liberties, including the right of women to make reproductive decisions free from govern-

mental interference. WBAI has filed briefs *amicus curiae* before this Court on behalf of parties whose rights were in jeopardy.

The **WOMEN'S BAR ASSOCIATION OF MASSACHUSETTS** was incorporated and exists for the purpose of promoting and enhancing the interests of women in the legal community by encouraging professional interaction and exchange of ideas among its members and between its members and other individuals, groups and organizations within or without the Commonwealth and within or without the United States, and further for the purpose of promoting and enhancing the interests of all women by encouraging interaction, education and the exchange of ideas among its members and between its members without the Commonwealth and within or without the United States. The Women's Bar Association states that it is an advocate of the rights of women under the laws and rules of the Commonwealth and has an interest in this appeal. There are important policy considerations and social ramifications of any decision regarding this matter.

WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK ("WBASNY") (which includes: the women's bar associations of Bronx County, Brooklyn, Capital District, Central New York, Mid-Hudson, Nassau, Orange-Sullivan, Queens, Greater Rochester, Rockland, Staten Island, Westchester, and Western New York) is an organization of over 3,000 attorneys throughout the state. Founded in 1980, its stated purposes include the following: to cooperate with, aid and support organizations and causes which advance the status and progress of women in the society; to facilitate the administration of justice; and to cultivate the science of jurisprudence. The members of WBASNY support the principles enunciated in *Roe v. Wade*, including the recognition of the constitutionally guaranteed right to privacy.

The **WOMEN'S CITY CLUB OF NEW YORK, INC.**, founded in 1916, is a membership organization concerned with contemporary societal problems and with promoting the

welfare of men, women and children by advocacy of an efficient government and a just legal system. The organization is concerned about this case because it feels that the principle established in *Roe v. Wade* was a step forward in establishing the freedom of women for domain over their own bodies and that any step backward is a challenge to that freedom and the equality of women in our society.

The **WOMEN'S EDUCATIONAL CENTER, INC.**, a nonprofit organization in Cambridge, Massachusetts, exists to help empower women, particularly victims of abuse, by offering crisis counseling, referral information, and support groups. The new Title X restrictions jeopardize the rights of women to make informed decisions. The proposed restrictions not only impinge on a doctor's obligation to provide comprehensive information to patients, but also threaten the very principles of a democratic society. We believe that withholding information is a manipulative action which results in powerlessness and subservience. For these reasons, The Women's Educational Center, Inc. is strongly opposed to these new restrictions.

The **WOMEN'S EQUAL RIGHTS LEGAL DEFENSE AND EDUCATION FUND** ("WERLDEF") is a non-profit corporation organized to ensure that women are educated about their rights under the law. WERLDEF supports the right of women who seek family planning services from Title X clinics to obtain information and medical care that will enable them to make an informed decision regarding their treatment and care. WERLDEF believes that the best decision is made when a woman is educated about the full range of choices legally and medically available to her. Because most of the women who seek family planning services from Title X clinics live in poor areas, WERLDEF is concerned for the health and safety of individual women who will turn to back-alley abortionists or attempt to abort their own fetuses if they are no longer able to obtain comprehensive and reliable health care from Title X clinics.

WOMEN'S HEALTH ACTION AND MOBILIZATION ("WHAM!") is a direct action group committed to demanding, securing and defending absolute reproductive freedom and quality health care for ALL women. Founded in 1989 after the *Webster* decision, WHAM! coordinates clinic defense in the New York metropolitan area, and organizes demonstrations, civil disobedience, workshops, trainings and educational forums to call attention to and confront a variety of women's health issues, including Title X restrictions, parental consent laws, access to drug trials and experimental treatments for women with AIDS/HIV, and the Catholic Church's increased attacks on abortion rights. WHAM! believes that access to quality health care is a fundamental human right.

WOMEN'S INTERNATIONAL RESOURCE EXCHANGE ("WIRE") is a small, feminist, non-profit collective that publishes and distributes material by and about Third World Women.

The **WOMEN'S LEGAL DEFENSE FUND** ("WLDF") is a tax-exempt non-profit membership organization founded in 1971 to challenge sex-based discrimination and to advocate for women's rights in society. WLDF believes strongly that to participate fully and equally with men in society, all women must have the right to decide for themselves whether and when to carry their pregnancies to term.

WOMEN'S PROJECT is a community based non-profit organization committed to the elimination of sexism and racism. Since 1981, the Women's Project has assisted women in organizing around these issues: violence against women, children, and people of color; women's economic issues, especially those affecting low income women; and social justice issues.

The **WOMEN'S STUDIES PROGRAM at Hunter College, City University of New York**, is composed of some sixty full-time affiliated faculty members and teaches some 2,000 students each year. Most of its students are young single women, many of them low-income and some who are single

mothers attempting to support their families and to get an education in order to improve their own and their children's lives. Access to safe, reliable reproductive health services is absolutely essential for these women, who depend on the availability of abortion counselling and referrals as one part of the social insurance infrastructure for remaining in school. It is the strong position of the Women's Studies Program that such access is and must remain part of every woman's personal and liberty rights. The survival of the Program's students and the work it does as educators literally depends upon it.

The **WOMEN'S STUDIES PROGRAM at Smith College** is committed to the education of women and education about the history, experience and cultural contributions of women of all races, classes, cultures, and ethnic backgrounds. The history of women has shown us that women cannot be equal partners in society unless they are assured of the right to full information about health issues, particularly concerning reproduction, and the right to make decisions for themselves. To deny full information about abortion to women seeking medical help in federally-funded family planning clinics would mean that full information about personal medical decisions would become a privilege of the wealthy. It would mean that the reproductive health and the ability to make medically informed decisions about private health matters would be denied to the five million women using federally-funded family planning clinics each year. The ability to pay should not determine access to information crucial to one's health and the ability to make reasoned choices about difficult, personal issues.

The **WOMEN'S STUDIES PROGRAM at Yale University**, founded in 1979, is an interdisciplinary program which aims to make gender the center of analysis in academic inquiries. The Women's Studies Program believes strongly in women's equality and their right to reproductive freedom.

WORKERS WORLD PARTY is a national multi-chapter organization based in New York City whose members include

working and poor women, youth, lesbians, seniors, disabled, unemployed and women on fixed incomes. It holds that every woman must be guaranteed choice, privacy, and access to and information concerning all aspects of reproductive health. It believes all women must have access to all procedures and information concerning reproductive matters and comprehensive health care, including safe, accessible, affordable abortion and birth control. To deny access to all available procedures and information to any women, especially the poor, youth and minority women, is discriminatory and unconstitutional. Every woman has the right to make informed choices about her life in all matters, including pregnancy, one of the most personal issues women face.

WORLDWATCH is a private, non-profit research organization based in Washington, D.C. The Institute was founded in 1975 to inform policymakers and the general public about the interdependence of the world economy and its environmental support systems. Included in its mission is to broaden the recognition both of access to family planning as a basic human right and as part of "sustainable development."

The **YALE JOURNAL OF LAW AND FEMINISM** was created in the Fall of 1987 to fill a void in feminist theory and legal scholarship. It hopes that the Journal will inject the feminist perspective into mainstream legal scholarship and will bring the legal world and its effects on women's lives into the view of a wide-ranging audience. It also wants to help expose and analyze both issues bearing specifically on women and the feminist struggle and to look at the world as a whole through a gender-conscious lens.

The **YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF U.S.A.** ("YWCA"), a national membership organization whose mission is the empowerment of women and the elimination of racism, strongly supports reproductive freedom of choice. Because the Department of Health and Human Services' regulations restrict that freedom, and run counter to First Amendment protection, the YWCA supports the position taken in this *amicus curiae* brief.

ZERO POPULATION GROWTH is a national, nonprofit organization with over 30,000 members. Founded in 1968, it is working to achieve a sustainable balance of the earth's population, environment and resources. The organization supports voluntary efforts to stabilize population growth through education and advocacy programs.

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IN THE
Supreme Court of the United States

OCTOBER TERM 1990

No. 89-1391 — IRVING RUST, *et al.*, *Appellants*,

v.

LOUIS SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES *Appellee.*

No. 89-1392 — NEW YORK, *et al.*, *Appellants*,

v.

LOUIS SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES *Appellee.*

On Appeal from the United States Court of Appeals for the Second Circuit

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BRIEF OF AMERICAN LIFE LEAGUE, INC., BERNARD NATHANSON, M.D. AND BERNADEL, INC. AS AMICI CURIAE IN SUPPORT OF APPELLEE

ROBERT L. SASSONE
Attorney at Law
900 North Broadway, Suite 725
Santa Ana, California 92701
(714) 542-1111
Attorney for Amici Curiae

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INTEREST OF AMICI

American Life League, Inc (ALL) is a c3 educational corporation which is probably the world's largest non church organization dedicated to the proposition of the Declaration of Independence "that all men are created equal, that they are endowed by their creator with certain unalienable Rights, that among these are Life..." ALL periodically distributes millions of copies of documents supporting the contention that being created equal gives the new individuals the Right to Life from the time of creation which is the time of fertilization when medical science agrees the new individual begins. The items published have included an analysis of the Reconstruction debates showing no intent to protect abortion via the Fourteenth

Amendment or to give any court the power to legislate its beliefs into law, an analysis of early Christian documents showing that all major Christian churches before the present generation condemned abortion, and an analysis of Title 1 USC Section 1 showing that Congress at the time of the Nazi War Crimes trials caused the definition of "person" to include "individual", because the term "individual" includes all humans, including the preborn.

If abortion has a father, that man is amicus Bernard Nathanson, MD. He was probably the leading theoretician of the abortionists when they developed the arguments that lead to the acceptance of abortion by segments of America. After legalization, he ran America's largest abortion facility and was associated with more abortions than any other

person. A few years after legalization, advancing medical knowledge and more refined ways to examine, understand and view the preborn human convinced him that for humanitarian non religious reasons abortion is wrong. He has since published the movie Silent Scream which shows a first trimester preborn human trying successfully for a short time, but ultimately unsuccessfully to dodge the suction tip of an abortion machine, and has republished medical articles showing that chemicals are present which appear to show some first trimester preborns feel pain when aborted.

Bernadel, Inc is an educational corporation monitoring published advances in medicine.

The consent of the parties to the filing of this brief has been obtained and is filed herewith.

SUMMARY OF ARGUMENT

The abortion battle is a conflict between the enumerated Right to Life and the unenumerated right to abortion.

Viability relates to all patients, not just infants. Viability measures the ability to treat the patient or infant, not the inherent characteristics or humanity of the patient or infant. Viability related to premature infants has so improved since 1973 that many thousands of infants have recently been aborted at ages where where they may have been considered non viable in 1973, but today they would have a better than 90% chance to survive if separated non violently from there mother. Recent advances in medical science indicate that this year, 1990, potential viability could be as early as the end of the first trimester.

This brief discusses advances in treatment of extremely premature preborn humans published too late to be referenced in briefs filed in abortion cases heard last term. It outlines recent relevant medical articles. It assumes that viability may have two related but different meanings:

1] that age at which it is possible for a preborn human to survive if non violently expelled from the uterus; or

2] that (older) age at which most non violently expelled humans survive.

<u>POSSIBLE VIABILITY</u>: It is believed that with present technology it is now theoretically possible for a twelve week gestation expelled human to survive. Because of the nature of problems related to experiments on human subjects, the technology, although proven on animals, has not yet been

tried on large numbers of young humans.

PROBABLE VIABILITY: It is believed that at the age of 23 weeks and weight of slightly more than one pound, infants are very likely to survive. In fact Madeline Mann, about half that size, was born in Chicago June 27, 1989 weighing 280 grams (10 ounces) and discharged healthy and with reasonable assurance that she would have no significant health problems. By the time the Court reads this brief, it is likely that even younger gestation infants will survive.

The new technology comprises improved ultra sound, oxygenated perfluorocarbons, lung sprays, blood recycling, and other techniques.

This Court has reversed its finding of Prudential Insurance Co v Cheek 259 US 530 (1922) that there was no Federal right to privacy and found that there

was after all a right to privacy that permitted abortion under conditions where the preborn human would be killed unconditionally to the moment of birth. Purported conditions permitting limiting of abortion after viability were impossible to implement within the impossibly narrow confines legislated by the Court. In 1983, the Akron dissent pointed out that we would soon have viability in the first trimester. Arguably, we now do. Justice O'Connor in Akron urged recognition of the State's interest, thereby permitting states to restrict abortion throughout pregnancy.

If the Court now accepts the Akron dissent, it will remove from the Federal Courts many cases and from this Court about one annual difficult case, (based on numbers since 1973). If not, it will again sanction killing viable humans.

I VIABILITY AND THE ABORTION RIGHT

Justice O´Connor, [1] in Akron v Akron Ctr for Reproductive Health 462 US 416, 76 L Ed 2d 687, 103 S Ct 2481 stated in dissent (with Justice White and Justice Rehnquist joining):

> [462 US 457] "In 1973, viability before 28 weeks was considered unusual....It is certainly reasonable to believe that fetal viability in the first trimester of pregnancy may be possible in the not too distant future. Indeed, the Court has explicitly acknowledged that Roe left the point of viability ´flexible for anticipated advancements in medical [462 US 458] judg ment, skill, and

[1] Akron v Akron Center for Reproductive Health 462 US 416, at 457-461, 76 L Ed 2d 687 at 720-723, 103 S Ct 2481 (1983)

technical ability, and we preserved the flexibility of the term.'....The Roe framework is clearly on a collision course with itself....As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception. Moreover, it is clear that the trimester approach violates the fundamental aspiration of judicial decisionmaking through the application of neutral principals 'sufficiently absolute to give them roots throughout the community and continuity over sufficient periods of time.'"

[462 US 460] "In Roe, the Court held that [462 US 461] although the State had an important and legitimate interest in protecting potential human life, that interest could not become

compelling until the point at which the fetus was viable. The difficulty with this analysis is clear: potential human life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy,

there is the potential for human life. Although the Court refused to 'resolve the difficult question of when human life begins,' id.. at 159, 35 LEd 2d 147, 93 S Ct 750, the Court chose the point of viability-when the fetus is capable of life independent of its mother-to permit the complete proscription of abortion. The choice of viability as the point at which the state interest in potential life becomes compelling is no less arbitrary than choosing any point before viability or any point

afterward. Accordingly, I believe that the State's interest in protecting human life exists throughout the pregnancy."

As will be shown infra, Justice O'Connor's 1983 future is now here.

Many factors decide elections. Nevertheless, to the extent the American people have exercised their choice as to the wisdom of the Akron majority in finding unenumerated Constitutional rights supporting abortion, as opposed to the wisdom of Justice O'Connor's Akron dissent, they have voted by landslide in favor of Justice O'Connor's 1983 Akron dissent. They have elected the more anti abortion candidate, the candidate of the anti abortion platform Republican Party in each recent presidential election. (In fact, Mr Bush was initially losing big in all polls.

Mr Bush won primarily by making two giant strides in popularity, the first associated in time with the publication of the Republican platform which supported the dissent position in Akron, and the second when he announced his anti abortion position.)

Most of more motivated Americans seem to agree with the Akron dissent. The largest (about 100 times as large as typical polls) recent poll of about 300,000 self selected readers of Parade Magazine, [1A] found 56% agreeing: "Abortion after the instant of conception is murder"; 80% disagreeing with the present unlimited abortion right; 61% disagreeing with even a first trimester abortion right, and 72% disagreeing with a second trimester abortion right.

[1A] Parade Magazine 8/19/90, Page 9

II HOW AND WHY VIABILITY HAS CHANGED AND WILL CHANGE

Viability changes are important at least because most Americans do not want an unenumerated Constitutional right to abort and therefore kill a human who could or probably would survive if separated from her mother in a less destructive manner.

Accordingly, this Court may wish to consider the effect of its decision in the near future as younger premature infants become viable at presently non viable ages and weights. It is possible that prematurity early in the next century will not affect possible viability.

Scientists had fertilized human ova decades ago, but were unable to cause any to survive to birth. Fertilization in a dish followed by implantation in the uterus has since made the recently

fertilized ovum possibly viable. So fetal viability has increased not only from the mature end, but also from the young and immature end since 1973. Viability may continue to increase from the immature end.

At the other (mature) end, probable viability is defined in the sense that if separated from the mother in a non violent fashion, the infant would have a better than even chance to survive. Probable viability has gone down from perhaps 28 weeks in 1973 to about 22-23 weeks today and perhaps even younger in the best facilities.

There are at least two definitions of possible viability, (1) the youngest premature human who has survived and (2) the youngest human who should have a chance to survive given ideal conditions and the use of those relevant techniques and instruments which have at least been

proven on non human animals.

By definition [1], possible viability is in 1990 somewhat less than twenty weeks. A twenty week premature infant weighs about one pound (16 ounces). Madeline Mann was born weighing only 10 ounces (about half the weight of a twenty week premature infant) in a Chicago hospital June 27, 1989. She was discharged home October 26, 1989, apparently healthy and normal.

In addition, when we discuss weeks, we should note that the pregnancy is frequently dated from the last menstrual period which would probably have been at least two weeks before fertilization of the ovum that made the new individual and therefore is two weeks greater than the premature infant's actual age.

If we make the very simple but reasonable assumption that the trends in improvement of viability will continue

as they have since 1973, probable viability is decreasing from the more mature end at a rate of at least six weeks per twenty years. If this past trend continues, in 2010 AD probable viability will be about 15 weeks, in 2030 AD about 9 weeks, and about 2050 AD probable viability in the sense that the premature infant will probably survive to be discharged from the hospital will extend throughout the pregnancy. Sixty years (until 2050) is not long in the desired lifetime of a good Constitutional law decision, even if based in part on scientific knowledge.

Many medical techniques are first tried on animals. It is considered that veterinary science usually leads human medical science by 5-10 years. The reason is that initial experiments are frequently very dangerous for the subject and just not done on humans

until after having been proven on non human animals. We can nevertheless frequently say that the success of a technique in animal experiments indicates that it would probably work on human subjects. From this it follows that today in 1990 the human premature infant of 12 weeks or less is possibly viable as indicated by the viability of equivalently mature animals in experiments which have not yet been done on humans, but could be performed in a sufficiently desperate case.

The premature human who is substantially certain to survive today is not different just before birth from the premature human of five or more years ago of identical weight, maturity and other characteristics who could not survive. Viability is in no way a measure of the humanity of the premature human. Viability is a measure of our

ability to care for the weak, premature, ill or injured human. Because knowledge and new techniques, medicines, equipment, etc, spread from initial experimental treatment facilities to other facilities, past viability is always lower than present viability and average viability is always lower than viability at better equipped or staffed facilities. For this and other reasons, studies may have apparently differing results because of differing implicit definitions of terms, which differences are not obvious from comparison of the studies.

Viability in the near future will probably change in a manner similar to the way it has changed in the recent past, partly through an evolutionary procedure but with an occasional major breakthrough.

The breakthroughs may comprise the

invention of a new medicine, instrument, etc, such as liquid oxygen carrying which makes it possible to offer treatment today that was not possible yesterday.

The evolution usually comprises the use of a new technique or combination of techniques which may comprise the use of one or more new or old medicines, instruments, etc first at one hospital, followed by success, publication, and use at other facilities.

By the nature of the improvement in viability enhancing techniques, yesterday's not viable but almost viable infant becomes today's just barely possibly viable infant who becomes the near future's probably viable infant and subsequently becomes routinely viable.

To the extent the past can teach us the future, one hospital tries something

which works, so the previously impossible (not viable) situation changes, and although all other data at the time would indicate a zero chance of viability, viability is no longer impossible. Over a period of time, the new technique, medicine, equipment, etc becomes available at more and more hospitals so that these better equipped hospitals have a recent viability record equal to the potential of the new system less reductions for items such as their inexperience, while other, perhaps most hospitals may still have a zero viability record. At that time, the viability of an appropriate premature infant may vary from zero percent at nearly every hospital to a much higher percentage chance, perhaps as high as 90% or more at appropriate hospitals.

AGE AT SUBSTANTIALLY CERTAIN SURVIVAL

As noted previously herein and by this Court in Akron supra [1], viability before 28 weeks was considered unusual in 1973. The present unenumerated abortion right seems to be based on that soon after 1973 obsolete evaluation.

Immature infant viability has been constantly improving for many years. Viability defines not the humanity of the preborn or premature human but the sophistication of the techniques used to care for premature infants or others. The obstetrical textbook amicus Dr Nathanson used, stated: [2]

[2] Williams Textbook on Obstetrics (1945) "Children born at this period [33 weeks, weighing 1900 grams or 4 pounds, 3 ounces] may live if properly cared for although their chances are not very promising."

The definition of viability of premature human babies has been changing for years as follows: One of today's not viable babies survives via new technique or equipment, so that viability changes. The technique or equipment proves its usefulness and is widely adopted.

This section considers not a 28 week premature, but babies about half that size, to 23 weeks, most of whom are slightly greater than one pound in weight. Today, a 23 week premature will probably survive. Ferrara, et al [3]

[3] Changing Outcome of Extremely Premature Infants (26 weeks Gestation or less and 750 Grams or less: Survival And Follow-Up At A Tertiary Center B Ferrara, R Hoekstra, E Graziano, G Knox, R Couser, and J Fangman published in American Journal of Obstetrics and Gynecology, (1989) 161: 1114-1118

have published part of the trend in the 1980's in the following table, Figure 1:

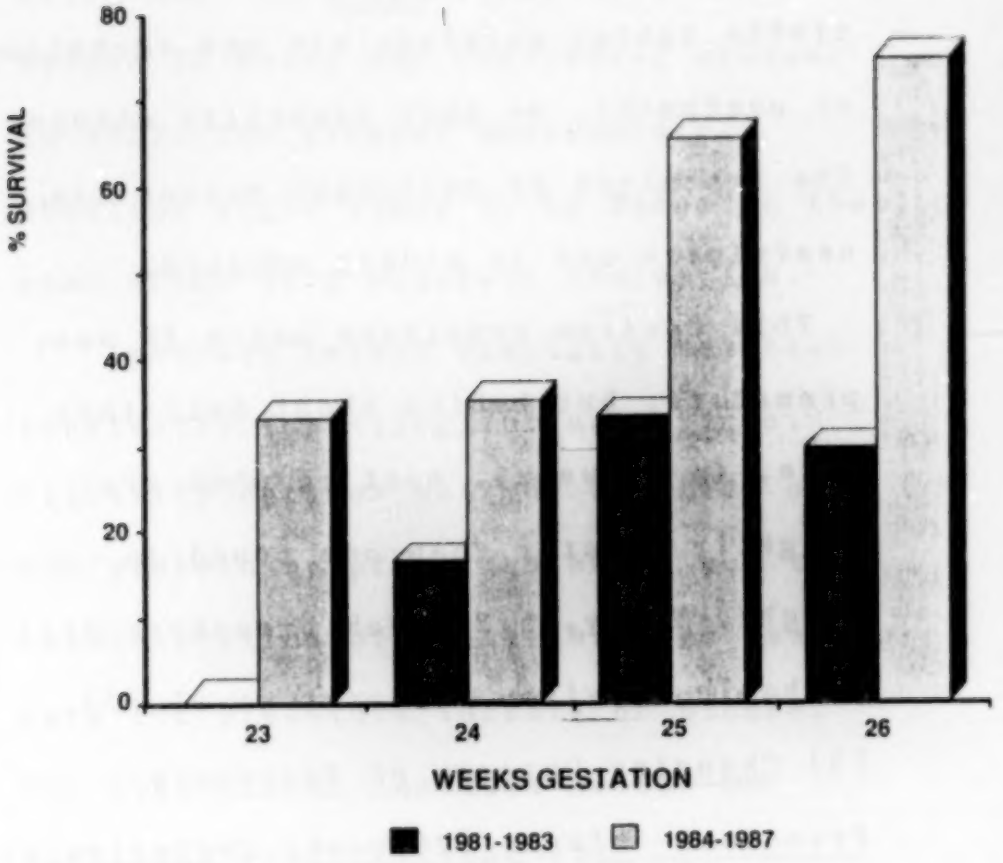


Figure 1. Demonstration of improved survival at each comparable gestational age in 1984-1987 compared with 1981-1983. Log-linear model, p 0.005

In 1981-1983, an insignificant number of 23 week infants survived.

During the next four year period, 1984-1987, more than thirty percent survived, a higher survival percentage than of 26 week prematures in 1981-1983. The trend continues. Today, a 23 week premature infant born (not any place, but in a properly equipped hospital) has a better than even chance to survive. Incidentally, approximately 75% of those babies who survived these extreme states of prematurity ultimately emerged healthy and neurologically intact.

Ehrenhaft, et al: [4]

[4] Changing Prognosis for Very Low Birth Weight infants Polly Ehrenhaft, MPH, Roger C Herdman, MD, and Judith L Wagner, PhD (from the Office of Technology Assessment, Congress of the United States) published in Obstetrics and Gynecology, September 1989, Vol 74: 528-535

have studied perinatal and neonatal morbidity and mortality trends in the US over the past 30 years. They conclude that there has been a dramatic improvement in both categories. Perhaps the most remarkable advance has been made in the 750-1000 gram group (1 pound, 10 ounces to 2 pounds, 3 ounces) in which there was at the time of the study a 70% survival rate (in contrast to the 35% survival rate 10 years earlier), and only 15-20% of these survivors will be left with severe handicaps (cerebral palsy, mental retardation, blindness, seizures, etc).

In the 1000-1500 gram group (2 pounds, 3 ounces to 3 pounds, 5 ounces) survival rates have risen from 50% in 1961 to 90% at the time of the study. 10% of those surviving babies were left with serious handicaps.

In the youngest group studied, 500-750 grams (1 pound 1 ounce to 1 pound, 10 ounces) which includes those considered totally non viable a short time ago, the Columbia-Presbyterian Medical Center in New York City indicated that there was a survival rate of 25-50% in the 500-750 grams group. 25% of the survivors had serious handicaps. The authors concluded:

"This review of the literature supports the conclusion that at least for very low birth weight infants neonatal mortality rates have continued to decline dramatically through the 1980's. Mortality has declined in every very low birth weight group..."

Reported and published data like the preceding lags a few years behind what is actually happening at any time. The

improvements from 1981-1983 to 1984-1987 have continued so that a similar table for 1988-1990 would probably show most 23 week premature infants surviving. These infants nearly all would have died in 1981-1983. 1990 is going to be better than the preceding years and some hospitals do better than others, so it is almost certain that in the best hospitals as you read this, a premature infant at the end of the second trimester at 23 weeks has a better than even chance, possibly a 90% chance to survive. Even younger infants will probably survive, which should stretch the definition of probable viability back past 22 or 23 weeks into the heart of the second trimester.

Not that it should matter, but most of the infants who die, die very quickly after birth sometime during the first 48

hours. This means that the infants who die do not cost much, minimizing adverse financial impact.

The ratio of disabled survivors has not increased. This means that many who in former years would have survived with disabilities now survive without disabilities because our ability to prevent disabilities is also increasing. The ratio of disabilities among more mature birth survivors is decreasing. The ratio of disabilities among the youngest survivors is comparable to the ratio of disabilities among the youngest survivors of former years (who however were born at a more mature age). This indicates that we will probably continue to reduce the percentage of disabilities among the youngest infants who survive today and will not find finances much affected as viability improves.

POTENTIAL TWELVE WEEK FETAL VIABILITY

Potential viability as used herein means that we now apparently have successfully proven all the techniques necessary for a 12 week (end of the first trimester) or younger fetus to survive and that in an appropriate case in 1990, using techniques, care and equipment we now have, it is possible that a 12 week fetus could survive independent of her mother. The odds may be heavily against such survival the first time the technique is tried on a twelve week fetus, but it can no longer be said that it is impossible for such a young premature infant to survive independent of her mother. There appear to be no technical reasons why survival of 12 week or even younger premature infants is not possible at the present time, even if unlikely until the

techniques now known are further refined. Amicus Nathanson, an expert in neonate care, believes it likely that such techniques will be successful this decade in every sufficiently equipped hospital.

Why has the too early premature infant died? By far the most common impediment to the survival of very low birth weight babies is respiratory distress syndrome (also known as hyaline membrane disease). In this condition the lungs of such tiny babies are undeveloped and inelastic, and they are intolerant of the tubes we place in their airways and of the oxygen we force down these tubes in high concentration and under high pressure (curiously oxygen at very high concentration and pressure can be poisonous to such little babies over a long period of time).

The solution is as follows:

Key term definitions include:

respiratory failure: the inability of the premature child to inhale and absorb oxygen in sufficient quantities;

air leak syndrome: a condition found more often in premature babies in which the inhaled air (and oxygen) leaks out of the lung before it can be absorbed into the blood stream;

neonatal respiratory disease: respiratory failure. Greenspan, [5] has performed an important experiment

[5] Liquid Ventilation of Preterm Baby, Jay S Greenspan, S David Rubenstein, Marla Wolfson, Thomas H Shaffer (from the Departments of Physiology and Pediatrics, Temple University School of Medicine, Philadelphia, PA) printed in The Lancet Nov 4, 1989, No. 8671:1095

and states in part:

"While advances in gas ventilation and surfactant replacement therapy have improved survival of premature babies, morbidity remains significant. Animal studies have demonstrated that ventilation with an oxygenated liquid perfluorochemical (PFC) supports gas exchange without deleterious consequences at ages where conventional techniques fail. (footnotes omitted) We report the application of liquid gas exchange and mechanics in a newborn baby.

A 28-week gestation, 12-day-old girl weighing 980 g with bilateral interstitial parenchymal disease was referred for management of respiratory failure and air-leak syndrome. She was treated with conventional and high frequency gas ventilation in an

attempt to diminish mean airway pressure and resolve air leaks. Despite improvements in these indices during the first few days of this therapy there was by day 4 physiological evidence for rapidly escalating pulmonary barotrauma with respiratory failure. Two physicians independent of the research team decided that conventional therapy had failed. Institutional approval and informed parental consent were obtained for liquid ventilation as an investigational therapy....

The infant tolerated liquid ventilation well without change in vital signs....During intermittent liquid ventilation there was a striking and sustained increase in PaO2 and decrease in PaCO2 which was maintained for about 2 h after the

procedure. There was an accompanying increase in pulmonary compliance and decrease in pulmonary resistance.

A chest X-ray immediately after liquid ventilation revealed homogeneous distribution of PFC (seen as radio-opacities) and no evidence of air leaks....

Previous in-vivo studies have been on immature animals with no evidence of barotrauma. This infant with severe lung disease improved in pulmonary function. This response may be related to the reduction in interfacial surface tension and uniform distribution of liquid, as corroborated by chest X-ray and supported by animal studies. The physiological responses observed illustrate the feasibility of this procedure as a potential therapy for

neonatal respiratory disease."

Neonatal respiratory disease is synonymous with respiratory failure, i.e. the lungs of the premature infant are not competent to capture and absorb sufficient oxygen to keep the infant alive and healthy. This limitation is the leading cause of death and/or disability in premature infants.

Greenspan, et al [5 supra] perfused (bathed) the child's lungs with oxygen-bearing PFC instead of gaseous oxygen. The child tolerated this therapy surprisingly well and actually improved her oxygenation.

The mere concept represents the promise of a giant step forward in the treatment of the tiniest newborn infants. The authors indicate in the article that they have had impressive success with this treatment in animal

experiments. The authors do away with invasive tubes and gaseous oxygen and instead have provided a gentle bath of oxygen-loaded liquid to flow through the tiny air passages. The blood vessels in the lung then pick up the oxygen from the liquid flowing over them. This therapy can be conceived as supplying the tiniest and most needy premature infants with the equivalent of gills to allow them to survive and mature until they can breath naturally. There appears to be no reason why infants at least as young as 12 weeks and even younger in the first trimester cannot survive independent of their mother using this technique. (Other techniques can take care of other premature infant needs.)

The technology has been shown in a different situation which may have inspired the preceding research in a

recent film called The Abyss. At one point a diver must be lowered 30,000 feet to the ocean bottom. At that depth the pressures are so great that oxygen pumped into his helmet cannot be forced into the vessels of his lungs, and it appears that the diver will die of asphyxia almost immediately. Instead, an oxygen-bearing liquid is flooded into his helmet. This is precisely the technology used by Greenspan et al.

We can expect that this year and in the near future, other premature infants will receive this treatment. More will gradually be learned until this technique or a derivation of it will permit premature infants considered non viable in 1989 to first sometimes, then frequently, then routinely survive. This viability improvement is likely to reach the first trimester by the year 2000 AD.

CONCLUSION

If the unenumerated abortion right is not eliminated and replaced with the Akron dissent or something similar, recent medical advances mean that this Court will be approving the killing for often trivial reasons of many innocent human beings mature enough to survive if expelled from their mothers in a less violent manner.

Respectfully submitted,

Robert L Sassone

ROBERT L SASSONE

Attorney for Amici

NOS 89-1391 and 89-1392 CONSOLIDATED
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

NO 89-1391 IRVING RUST, et al,
Appellants,
v
LOUIS SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES
, Appellee.
and
NO 89-1392 NEW YORK, et al,
Appellants,
v
LOUIS SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES
Appellee.

State of California }ss.
City of Santa Ana, County of Orange }

Robert L Sassone, being first duly sworn on his oath deposes and says:

Robert L Sassone is a member of the bar of the United States Supreme Court admitted October 26, 1971. To his knowledge, on August 22, 1990, within the particular time and the permitted time for serving of said amicus brief pursuant to Rule 28.2 with first class postage prepaid 40 copies of the attached amicus brief in the present case properly addressed to the Clerk of the United States Supreme Court and three copies of said amicus brief to each party addressed as follows:

KENNETH W STARR
SOLICITOR GENERAL
OFFICE OF THE SOLICITOR GENERAL
US DEPARTMENT OF JUSTICE
TENTH & PENNSYLVANIA AVE
WASHINGTON, DC 20530

RACHEL PINE, ESQ
ACLU FOUNDATION
132 W 43RD ST
NEW YORK, NY 10036

SUZANNE M LYNN, ESQ
ST OF NEW YORK
DEPARTMENT OF LAW
120 BROADWAY
NEW YORK, NY 10271

LOUIS SULLIVAN, SECRETARY
HEALTH & HUMAN SERVICES
200 INDEPENDENCE AVE SW
WASHINGTON DC 20201

ROBERT L SASSONE, Affiant

Subscribed and sworn to before me on August 22, 1990

Notary Public

BEST AVAILABLE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1391

DR. IRVING RUST, *et al.*,
Petitioners,

v.

LOUIS W. SULLIVAN, SECRETARY OF
HEALTH AND HUMAN SERVICES,
Respondent.

No. 89-1392

THE STATE OF NEW YORK, *et al.*,
Petitioners,

v.

LOUIS W. SULLIVAN, SECRETARY OF
HEALTH AND HUMAN SERVICES,
Respondent.

**On Writs of Certiorari to the
United States Court of Appeals
for the Second Circuit**

BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS IN NOS. 89-1391 AND 89-1392

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Knights of Columbus, a fraternal organization of 1.5 million members, has a long history of pro-family advocacy. For example, *amicus* largely underwrote the litigation in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). *Amicus* is concerned about the effect that aggressive advertising of abortion, often under the guise of "counselling," has on vulnerable adolescents and on the values of society at large.

All parties have consented to the filing of this brief.

STATEMENT

Title X of the Public Health Services Act, 42 U.S.C. §§ 300 - 300a-8 (1982 & Supp. V 1987), authorizes the Secretary of Health and Human Services ("the Secretary") to make grants to public and nonprofit entities, to establish projects that "offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services and services for adolescents)." 42 U.S.C. § 300. Congress provided, however, that "[n]one of the funds appropriated under the subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6.

In 1988 the Secretary replaced the then-existing regulations implementing Title X.[1] The new regulations attach three major conditions to a grantee's receipt of federal funds under Title X. First, a "Title X project may not provide counselling concerning abortion as a method of family planning or provide referrals for abortion as a method of family planning." 42 C.F.R. § 59.8

[1] The original regulations, which were implemented prior to *Roe* v. *Wade*, 410 U.S. 113 (1973), required merely that grantees "not provide abortions as a method of family planning" in Title X programs, although they permitted "non-directive counselling" about abortion and referrals. *See* 42 C.F.R. § 59.5(9) (1972).

(a)(1). Title X projects likewise may not provide referrals for abortions, except in cases of medical emergency. 42 C.F.R. § 59.8(a)(2). Second, the regulations require a case-by-case determination of the "objective integrity and independence" of a Title X project, where the grantee who administers that project also provides abortion services. The regulations list a variety of factors that inform this determination, including the existence of separate accounting records, facilities, personnel, etc. *See* 42 C.F.R. § 59.9. Finally, the regulations prohibit abortion advocacy. The regulations cite as examples of such prohibited advocacy, lobbying and instituting legal actions to make abortion available as a method of family planning. 42 C.F.R. § 59.10(a).

Petitioners brought suit to enjoin these regulations as inconsistent with the right to abortion announced in *Roe* v. *Wade*, 410 U.S. 113 (1973), and with the Free Speech Clause of the First Amendment. Petitioners also claimed the regulations were not authorized by Title X. The district court upheld the regulations, rejecting all of petitioners' arguments. A divided panel of the court of appeals affirmed.

SUMMARY OF ARGUMENT

Both of petitioners' constitutional arguments depend on the validity of *Roe* v. *Wade*, 410 U.S. 113 (1973). Petitioners' Fifth Amendment argument does so explicitly. Petitioners' First Amendment argument, although it does not expressly invoke *Roe*, also depends on that decision for its force. Petitioners' claim that non-emergency abortion referrals are pure speech is necessarily contingent on *Roe*'s holding that abortion is a constitutional right. Otherwise, abortion could again be outlawed by the States, or prohibited by the federal government. And non-emergency referrals would be, at most, commercial speech, which could be prohibited altogether under *Posadas de Puerto Rico Assoc.* v. *Tourism Co. of Puerto Rico*, 478 U.S. 320 (1986). The validity or in-

validity of *Roe* thus determines the First Amendment standard of review to be applied in this case, and should be considered as a threshold matter.

Nothing in the doctrine of *stare decisis* precludes reconsideration of *Roe*. Although the Court has never set forth in detail the applicability of the common law doctrine of *stare decisis* to its constitutional decisions, the Court's opinions overruling or declining to overrule prior cases are themselves precedents on that point. Those cases demonstrate that the Court has been willing to reconsider constitutional precedent whenever it possesses an articulable reason for believing the precedent to be erroneous. Such articulable reasons have included the case's inconsistency with prior and subsequent precedent or with other areas of the law, the impracticability of a case's legal framework, unusually intense academic criticism, or simply the firm belief that the case was wrongly decided. The Court has not been deterred by the fact that an erroneous case was either particularly recent or particularly old. It has not hesitated to overrule either close or unanimous decisions, and it has not apologized for overrulings that result from changes in the Court's membership. What *has* deterred the Court from overruling erroneous constitutional precedent is evidence that a precedent's rule has become so embedded in the law or so intertwined with statutory law that overruling it is effectively impossible.

Applying these precedents to *Roe*, it is clear that the case should be reconsidered and overruled. Far from being embedded in the law, *Roe* has never been fully accepted as definitive law at all. It has been supported by an ever-shrinking majority and plurality of this Court. The Executive Branch has repeatedly called upon the Court to overrule it. There have been attempts in Congress to circumvent or limit it. Several state legislatures have openly challenged it, and it continues to be the source of vigorous public protest. *Roe* has been bitterly criticized by a wide variety of academic commentators, many of whom are actually sympathetic to the notion of legalized abortion. *Roe*'s trimester framework is inherently unworkable. It is, furthermore, fundamentally at odds with large areas of the tort law, property law, and criminal law of the States. *Roe* is, in the last analysis, profoundly wrong. It should be reconsidered and overruled.

ARGUMENT

Petitioners mount two constitutional challenges to the regulations at issue here.[2] First, petitioners note (correctly, in *amicus*' view) that the regulations are inconsistent with *Roe* v. *Wade*, 410 U.S. 113 (1973); petitioners claim that the regulations therefore infringe the Due Process Clause of the Fifth Amendment. Brief for Petitioners in No. 1391 ("Br. Pet. I") at 31-37; Brief for Petitioners in No. 1392 ("Br. Pet. II") at 47-50. Petitioners' second and apparently preferred ground of attack is the Speech Clause of the First Amendment. Br. Pet. I at 13-30; Br. Pet. II at 32-46. Although petitioners never say so, their Speech Clause argument also necessarily depends to a great extent on the validity of *Roe*.

I. THE APPROPRIATE STANDARD OF REVIEW UNDER THE FIRST AMENDMENT DEPENDS UPON WHETHER *ROE* v. *WADE* IS GOOD LAW

But for *Roe*, the "referrals" at issue here would be, at best, proposals for a commercial medical transaction permitted only by legislative grace; at worst, they would be solicitations to commit a crime.[3] But for *Roe*, therefore, the referrals would be at most commercial speech, and

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[2] Petitioners also challenge the regulations as not authorized by Title X. *Amicus* will not address that issue.

[3] In 1973 most states prohibited all or most abortions. *See* Linton, *Enforcement of State Abortion Statutes After Roe: A State-by-State Analysis*, 67 U. Det. L. Rev. 157, 255-57 (1990) (listing states).

the regulations limiting them would be reviewed under the guidelines enunciated in *Central Hudson Gas & Elec. Corp.* v. *Public Servs. Comm'n of New York*, 447 U.S. 557, 566 (1980).

Under that standard, the regulations would certainly be constitutional. In *Posadas de Puerto Rico Assoc.* v. *Tourism Company of Puerto Rico*, 478 U.S. 328 (1986), this Court upheld, against a First Amendment challenge, a Puerto Rico statute that outlawed casino advertising aimed at residents of Puerto Rico, but affirmatively permitted such advertising with respect to tourists. The Court noted that "the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether. . . . [T]he greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling. . . ." 478 U.S. at 345-46. The Court distinguished *Carey* v. *Population Servs. Int'l*, 431 U.S. 678 (1977), and *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), which struck down restrictions on the advertising of contraceptives and abortion, respectively. The *Posadas* Court said that in those cases "the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the State." 478 U.S. at 345.[4]

But for *Roe*'s holding that abortion is a constitutional right, it could again be criminalized by the States, or it could be prohibited by Congress under its Commerce Power or by the Secretary exercising delegated legislative authority. Even if abortion were not criminalized, the federal government could, under *Posadas*, prohibit the referrals in question. There is, therefore, no

[4] *See also Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Counsel*, 425 U.S. 748, 760 (1976) (striking down statute forbidding advertising of prices of prescription drugs; noting that such advertisements "related to activity with which, at least in some respects, the State could not interfere").

question that, but for *Roe*, the regulations petitioners challenge would be constitutional. As *Posadas* noted, it would "surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand." 478 U.S. at 346. It would be even stranger if Congress or the Secretary could prohibit abortion, but could not condition the receipt of federal funds on the recipient's willingness to forego making referrals for abortions except in cases of medical emergency.

In short, if *Roe* is not good law, the regulations at issue in this case implicate only commercial speech, and are clearly proper. *See Posadas*, 478 U.S. at 339-344; *cf. Bigelow*, 421 U.S. at 831 (Rehnquist, J., dissenting) ("the [abortion] advertisement appears to . . . be a classic commercial proposition"). If, on the other hand, *Roe* remains good law, the Court must decide whether the regulations at issue here improperly burden pure speech. *See Regan* v. *Taxation with Representation*, 461 U.S. 540 (1983); *Perry* v. *Sindermann*, 408 U.S. 593 (1972). That is, admittedly, a closer question. Because the validity or invalidity of *Roe* thus determines the Court's standard of review in this case, it should be addressed as a threshold matter.[5]

[5] Petitioners urge the Court to avoid the constitutional questions in this case by holding that the regulations are not authorized by Title X. *See* Br. Pet. I at 37-39. That argument might have some force if the constitutional issues in question were ones that the Court ought to avoid under *N.L.R.B.* v. *Catholic Bishop*, 440 U.S. 490, 500-501 (1979). The validity of *Roe*, however, is a constitutional question the Court ought affirmatively to resolve. *See infra*, at 17-21.

II. THE DOCTRINE OF *STARE DECISIS* PRESENTS NO OBSTACLE TO A RECONSIDERATION OF *ROE*

A. The Question Whether to Depart from *Stare Decisis* and Reexamine Precedent Is Itself a Question of *Stare Decisis*

This Court has never definitively stated how the common law doctrine of *stare decisis* applies to the Court's constitutional decisions.[6] The Court has indicated generally that the barrier of *stare decisis* is not a particularly high one in constitutional cases: "[w]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decision." *Smith* v. *Allwright*, 321 U.S. 649, 665 (1944).[7]

[6] According to Justice Powell, the Court overrules an average of just over three cases per Term. Thus, "[d]uring [Chief Justice] Warren's tenure, the Court overruled sixty-three cases. The Burger Court . . . overruled some sixty-one cases." Powell, *Stare Decisis and Judicial Restraint*, 47 Wash. & Lee L. Rev. 281, 284 (1990).

[7] The Court has indicated a greater reluctance to overrule its statutory constructions, on the theory that Congress can more readily remedy perceived errors in such cases than in constitutional ones. *See Patterson* v. *McLean Credit Union*, 109 S. Ct. 2363 (1989) (reconsidering, but not overruling *Runyon* v. *McCrary*, 427 U.S. 160 (1976)); *Monell* v. *New York City Dep't of Social Servs.*, 436 U.S. 658, 695 (1978); *Edelman* v. *Jordan*, 415 U.S. 651, 671 & n.14 (1974). Nevertheless, the Court has not hesitated to overrule even statutory cases when circumstances warrant. For example, *Monell* overruled *Monroe* v. *Pape*, 365 U.S. 167 (1961), and held that municipalities may be liable for damages under § 1983. The *Monell* Court explained its decision to revisit the question as being justified by the fact that many of the Court's cases "both before and after *Monroe* are inconsistent with *Monroe*." 436 U.S. at 696.

On the other hand, the Court has also indicated that something more than undifferentiated doubt is necessary to cause the Court to reconsider its constitutional precedents. "[A]ny detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.'" *Vasquez* v. *Hillery*, 474 U.S. 254, 266 (1986) (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)). Although the Court has never formulated precisely the nature of those "articulable reasons," "experience," or "newly ascertained" facts, the Court's actions and stated reasons in choosing when to overrule its prior cases are themselves precedents on the question. Those precedents demonstrate that, in practice, all that has been required of such "experience" or "facts" is that they present the "articulable reasons" for believing precedent to be wrong.[8]

[8] Individual Justices have suggested more elaborate approaches both in individual opinions and in law review articles. Justice Scalia wrote in *South Carolina* v. *Gathers*, 109 S. Ct. 2207, 2218 (1989), that "[w]ith some reservation concerning decisions that have become so embedded in our system of government that reform is no longer possible," *stare decisis* has little place in constitutional decisions. Justice Douglas likewise believed that "the place of *stare decisis* in constitutional law" was "tenuous," and stressed that "above all else . . . it is the Constitution which [a Justice swears] to support and defend, not the gloss which his predecessors may have put on it." Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949). Justice Powell on the other hand has argued for a somewhat more vigorous version of the doctrine. Powell, *Stare Decisis and Judicial Restraint*, 47 Wash. & Lee L. Rev. 281, 284 (1990). Yet he still permits exceptions. He posits, for example, that "a new Justice is less bound by precedent in construing a provision of the Constitution than a Justice who was sitting when a precedent was decided." *Id.* at 284.

Justice Stevens articulated a relatively strict standard in *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. Rev. 1 (1983); *see also Florida Dep't of Health and Rehab. Servs.* v. *Florida Nursing Home Ass'n*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring). Other Justices who have written on the subject include Justice Goldberg,

See Mitchell v. *W.T. Grant Co.*, 415 U.S. 600, 627-28 (1974) (Powell, J., concurring) ("It is . . . not only [the Court's] prerogative but also [its] duty to reexamine a precedent where its reasoning is fairly called into question. And if the precedent or its rationale is of doubtful validity, then it should not stand.").

For example, in *United States v. Darby*, 312 U.S. 100 (1941), the Court overruled *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918), and upheld the constitutionality of the Fair Labor Standards Act. In *Dagenhart*, the Court had ruled that Congress lacked power to regulate the production of "harmless" goods for commerce, and consequently struck down a child labor law. The *Darby* Court explained "that *Hammer* . . . was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled." 312 U.S. at 116-17.

The Court has often reconsidered its precedents, even *sua sponte*, when subsequent experience shows the framework they establish to be analytically flawed. For example, in *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), the Court overruled, by a 5-4 vote, *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). That case had held that the Tenth Amendment prohibited Congress from intruding upon "traditional government functions" of the States. Neither of the parties in *Garcia* asked the Court to reconsider *National League of Cities*; they simply debated whether or not setting the pay scale of municipal transit employees was a "traditional government function." Nevertheless, while considering that

Equal Justice 4 (1971); Justice (then-Solicitor General) Reed, *Stare Decisis and Constitutional Law*, 35 Pa. B.A.Q. 131 (1938), and Justice Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334 (1944). *See also* Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 Cornell L. Rev. 401 (1988).

question, a majority of the Court apparently concluded that the entire *National League of Cities* framework was suspect. Consequently, the Court set the case for reargument, specifying as a new question presented whether *National League of Cities* should be overruled. 468 U.S. 1213 (1984) (mem.). Then, after rehearing, the Court voted 5-4 to overrule *National League of Cities*. Writing for the Court, Justice Blackmun explained that:

> Our examination of this "function" standard applied in . . . cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional government function" is not only unworkable but is also inconsistent with . . . [the] principles on which *National League of Cities* purported to rest.

Garcia, 469 U.S. at 531. *Garcia*, therefore, demonstrates the propriety of overruling relatively recent precedent, even when the Court has not been asked to do so, and even when only a bare majority of the Court considers the precedent unsound.[9]

Nor has the Court hesitated to abandon longstanding precedents, even at the cost of great resulting turmoil, when it comes to believe that their analytical frameworks lack foundation. Thus, in *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), the Court overruled *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842), which had held that federal courts, sitting in diversity cases, should apply federal "general" common law, but state "local" common law. There was nearly a century of judicial precedent elaborating and refining *Swift*'s distinction between "local" and "general" law. The Court could have decided *Erie* simply by further refining that standard and holding that

[9] According to Justice Dougles, from 1937 to March 28, 1949, the Court overruled thirty earlier decisions. "In twenty-one of these the reversals were on constitutional grounds. In the great majority of the thirty cases the cases overruled had been decided within the previous twenty years." Douglas, *supra* note 8, at 743.

certain state tort law was "local," not "general." Nevertheless, the Court completely overruled *Swift*. Justice Brandeis explained that:

> Experience in applying the doctrine of *Swift* v. *Tyson* had revealed its defects, political and social; . . . [T]he impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.

Erie, 304 U.S. at 74.[10]

Likewise, when *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954), overruled *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), it overturned a settled, though pernicious, social practice, the constitutionality of which had been repeatedly assumed by this Court—in *Plessy* itself, as well as in *Cumming* v. *Board of Educ.*, 175 U.S. 528 (1899); *Gong Lum* v. *Rice*, 275 U.S. 78 (1927); *Missouri Ex Rel. Gaines* v. *Canada*, 305 U.S. 337 (1938); *Sipuel* v. *Board of Regents*, 332 U.S. 631 (1948); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950); *see also Berea College* v. *Kentucky*, 211 U.S. 45 (1908). Nevertheless, the *Brown* Court gave *Plessy* only short shrift, and justified its departure from *stare decisis* simply with the observation that *Plessy* was wrong. "Whatever may have been the extent of psychological knowledge at the time of *Plessy* . . . this finding is amply supported by modern authority." 347 U.S. at 494 (footnote omitted). *Plessy*'s applicability to public education had, moreover, previously been questioned. *Id.* at 690.

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[10] Although *Erie* turned in large part upon the proper construction to be placed on the Rules of Decision Act, the Court explained that it was more than simply a statutory case. "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so." *Erie*, 304 U.S. at 77-78.

The Court has sometimes elaborated on its reasons for doubting the validity of a precedent's analytical framework. In *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the Court partially overruled *Swain* v. *Alabama*, 380 U.S. 202 (1965), which had held that a defendant who claimed racial discrimination in his jury selection process must prove that the peremptory challenge system as a whole (and not just the jury selection in his individual case) was racially biased. As in *Erie* and *Garcia*, the *Batson* Court observed that the standard it had previously crafted had proven unworkable in practice. It "placed on defendants a crippling burden of proof" that resulted in "prosecutors' peremptory challenges [being] largely immune from constitutional scrutiny." 476 U.S. at 92-93.

The *Batson* Court, however, gave two additional reasons for believing *Swain* unsound. First, it noted that the "decision in *Swain* ha[d] been the subject of extensive commentary." *Id.* at 90 n.14. The Court cited seven law review articles that argued that *Swain* should be reconsidered, and a single article arguing that *Swain* should stand. *Ibid.* Second, the Court found that other developments in the law were in tension with *Swain*'s earlier rule. *See id.* at 93-95. It thus reconsidered *Swain* and partially overruled it.

It is equally instructive to note factors that have not been sufficient to prevent the overruling of precedent. The Court, for example, has apparently not been concerned with the closeness of its vote—either in the case to be reconsidered or in the case before it. Thus, the Court has not been deterred from overruling even unanimous decisions it has come to believe erroneous. In *Osborne* v. *Mobile*, 83 U.S. (16 Wall.) 479 (1872), for example, the Court unanimously permitted a state to impose a nondiscriminatory license tax on interstate businesses. Sixteen years later, however, the Court unanimously overruled that unanimous decision, and held that such license taxes were unconstitutional. *Leloup* v. *Port of Mobile*,

127 U.S. 640 (1888). *Leloup* explained simply that "[i]n view of the course of decisions which ha[d] been made since" *Osborne*, it was "very certain" that the ordinance upheld in this case was unconstitutional. It added that:

> a variety of cases involving the commercial power of Congress has been brought to the attention of the Court during the past fifteen years which have frequently made it necessary to re-examine the whole subject with care; and the result has sometimes been that in order to give full and fair effect to the different clauses of the Constitution, the Court has been constrained to return to the fundamental principles stated . . . in former times, and to modify in some degree certain *dicta* and decisions that have occasionally been made in the intervening period.

127 U.S. at 647-48.[11]

The Court has also not hesitated to overturn recent 5-4 decisions with opposite 5-4 decisions. In *Jones* v. *Opelika*, 319 U.S. 103 (1943) (*"Jones II"*), and *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), the Court reversed its own decision of the previous term in *Jones* v. *Opelika*, 316 U.S. 584 (1942) (*"Jones I"*), and struck down a license tax imposed on the dissemination of religious literature. The only difference between the two cases was that Justice Rutledge, who voted with the majority in *Murdock* and *Jones II*, had replaced Justice Byrnes, who had provided the fifth vote to the majority in *Jones I*. The *Murdock* Court did not apologize for that fact, however, and justified its decision solely with the observation that *Jones I* was wrong: "The judgment in *Jones* v. *Opelika* has this day been vacated. Freed from that controlling precedent, we can restore to their high,

[11] Indeed, the overruling of unanimous opinions has not been as rare as one might suppose. According to Justice Douglas, "[d]uring the thirty-year period between 1860 and 1890, the Court on eighteen occasions overruled (expressly or in effect) controlling precedents . . . . In thirteen of the overruled cases the Court had been unanimous." Douglas, *supra* note 8, at 739.

constitutional position the liberties of itinerant evangelists who disseminate their religious beliefs and the tenets of their faith through distribution of literature." 319 U.S. at 117.[12]

Similarly, in *Garcia*, *supra*, the Court overruled (5-4) *National League of Cities*, *supra*, which itself overruled (5-4) *Maryland* v. *Wirtz*, 392 U.S. 183 (1968). (*National League of Cities* overruled *Wirtz* because it concluded that *Wirtz*'s analysis was "simply wrong." 426 U.S. at 854-55.)[13]

What has deterred the Court from overruling erroneous precedent is evidence that the precedent's rule has become so intertwined with statutory law that overruling it would essentially be impossible. Thus, in *Davis* v. *Department of Labor*, 317 U.S. 249 (1942), the Court limited, but did not overrule, *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205 (1917), which had created a questionable rule of admiralty jurisdiction.[14]

Concurring in *Davis*, Justice Frankfurter acknowledged that *Jensen* should be overruled, but declined to do so on the following grounds:

[12] *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870), likewise overruled *Hepburn* v. *Griswold*, 75 U.S. (8 Wall.) 604 (1869), on the strength of President Grant's intervening appointments.

[13] *See also Board of Educ.* v. *Barnette*, 319 U.S. 624 (1943), *overruling Minersville School Dist.* v. *Gobitis*, 310 U.S. 586 (1940). The *Barnette* Court noted simply that "[t]his case calls upon us to reconsider a precedent decision, as the Court throughout its history often has been required to do." 319 U.S. at 630 (footnote omitted).

[14] *Jensen* had held that the Constitution's grant of admiralty and maritime jurisdiction to federal courts prevented a state from requiring compensation for a longshoreman injured on the gangplank of a docked ship. *Davis* then upheld an award under Washington law to the widow of a worker who drowned in a navigable river. It did so by creating a "twilight zone," in which employees could recover under either federal or state law. 317 U.S. at 256.

> [S]uch a desirable end cannot now be achieved merely by judicial repudiation of the *Jensen* doctrine. Too much has happened in the twenty-five years since that ill-starred decision. . . . Federal and State enactments have so accommodated themselves to the complexity and confusion introduced by the *Jensen* rulings that the resources of adjudication can no longer bring relief from the difficulties which the judicial process itself brought into being. Therefore, until Congress sees fit to attempt another comprehensive solution of the problem, this Court can do no more than bring some order out of the remaining judicial chaos as marginal situations come before us.

317 U.S. at 259 (Frankfurter, J., concurring).

Davis thus provides an instructive counterpoint to *Erie* and *Brown*. Taken together, the three cases demonstrate that reconsideration of precedent is appropriate, even at the cost of great legal and social upheaval, provided that overruling the precedent so reconsidered would actually grant relief.

In sum, this Court's precedents indicate that reconsideration of a precedent is appropriate when the framework it establishes has proven unworkable (*Swain*, *Garcia*, *Erie*), when the case has been the subject of unusual academic criticism (*Batson*), when it is in tension with other aspects of the law (*Darby*, *Batson*), when the Court's subsequent cases call the precedent into question (*Brown*, *Leloup*), or when further reflection demonstrates that the decision, whether unanimous or narrowly decided, old or recent, is clearly wrong (*Darby*, *Murdock*, *Barnette*). The most frequently articulated constraint on reconsideration of a demonstrably erroneous precedent has been that the precedent has become so embedded in the law that reconsideration is effectively impossible. *Davis*, *supra*; *see Gathers*, 109 S. Ct. at 2218 (Scalia, J., dissenting); Stevens, *supra* note 7, at 6-9; Cooper, *supra* note 7, at 406.

B. This Court's Precedents Indicate That *Roe* Should Be Reconsidered

All of the foregoing reasons demonstrate that *Roe* should receive a full-dress reconsideration.

Far from being embedded in the law, *Roe* has never been fully accepted as settled law at all. It has been adhered to by an ever smaller majority and plurality of this Court. *See Roe* (7-2 majority); *Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (6-3 majority); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (5-4 majority); *Webster* v. *Reproductive Health Servs.*, 109 S. Ct. 3040 (1989) (four Justices voting to reaffirm, five justices split over whether reconsideration necessary). There have been repeated calls, in both the Executive and Legislative Branches, for *Roe*'s demise. *See, e.g.*, Briefs for the United States as *Amicus Curiae* in *Webster* v. *Reproductive Health Servs.*, No. 88-605; *Hodgson* v. *Minnesota*, No. 88-1125; *Thornburgh* v. *American College of Obstetricians and Gynecologists*, No. 84-495; Hearings on S.158 Before the Subcommittee on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess., Vol. 1 (1982). And there have been repeated attempts in the State legislatures to limit or circumvent *Roe*. Indeed, in the past year alone the legislatures of Pennsylvania, Idaho, Louisiana and the Territory of Guam have all voted to challenge *Roe* in whole or in part. *See* 1989 Pa. Laws 592, No. 64; Guam Pub. Law No. 20-134 (1990); *see also N.Y. Times*, July 28, 1990, § 1, p.1, col. 1; March 31, 1990, § 1, p.1, col. 1. Nor has *Roe* been accepted by the populace at large, as a wide variety of organized and unorganized protests demonstrates.

Ever since it was handed down, *Roe* has been the subject of withering academic criticism, even from many scholars sympathetic to legalized abortion. *See, e.g.*, Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*,

82 Yale L.J. 920, 947 (1973) (*Roe* "is bad constitutional law, or rather . . . it is not constitutional law at all and gives almost no sense of an obligation to try to be") (emphasis omitted); Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159, 184 ("*Roe* v. *Wade* is symptomatic of the analytical poverty possible in constitutional litigation"); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221, 301 (1973) (the *Roe* "Court could have put it better had it been candid enough to quote *Lochner*"). *See also* J.H. Ely, *Democracy and Distrust* 2-3, 248 n.52 (1980); Burt, *The Constitution of the Family*, 1979 Sup. Ct. Rev. 329, 371-77; Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 Wash. U. L. Q. 817, 819; A. Cox, *The Role of the Supreme Court in American Government* 113 (1976); A. Bickel, *The Morality of Consent* 27-29 (1975).

As was true with the legal structures built in *Swift* and *National League of Cities*, *Roe*'s trimester framework is inherently unworkable. *See Webster*, 109 S. Ct. at 3056 (plurality opinion) ("We have not refrained from reconsideration of a prior construction of the Constitution that has proved 'unsound in principle and unworkable in practice' . . . . We think the *Roe* trimester framework falls into that category.") (citations omitted). *Akron*, 462 U.S. at 458 (O'Connor, J., dissenting) ("The *Roe* framework . . . is clearly on a collision course with itself." As Justice White has noted, *Roe's* viability standard has almost nothing to do with attributes of personhood, or a particularized state of being, and everything to do with the "state of medical practice and technology" that allows an unborn child to survive at an ever earlier point in gestation. *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747, 795 (1986) (White, J., dissenting). Moreover, the quality of medical technology varies not only with time, but also with locale. Many unborn children

who are "viable" on any given day in a major metropolitan center would not be viable in a more rural setting. *Roe*'s framework can thus result in the same unborn child periodically gaining, losing, and regaining viability whenever his mother travels.[15]

Roe is, and always has been, inconsistent with vast areas of the statutory and common law of the States. As Dean Ely has observed, even "the bodies of doctrine to which the [*Roe*] court advert[ed] respecting the protection of fetuses under general legal doctrine tend to undercut rather than support its conclusion." *Ely*, *supra*, at 925.

In the law of property, for example, an unborn child has always been considered a person in being for all purposes that are to his or her benefit, including taking by will or descent. *See* Epstein, *supra*, at 159, 174; Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 Notre Dame Law. 349, 351-53 (1971) ("The property rights of the unborn child are as old as the common law itself."). *See also Thellusson* v. *Woodford*, 311 Eng. Rep. 117 (Ch. 1798). There, an 18th century English court, replying to the contention that a devise for the life of a child *en ventre sa mere* was void because the child was a non-entity, wrote:

> Let us see what this non-entity can do. He may be vouched in recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions . . . . He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction, and he may have a guardian.

311 Eng. Rep. at 163.

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[15] Indeed, it is doubtful whether there is any such thing as a "viable" infant at all. Born or unborn, every infant is utterly dependent upon its parents and society. So are many other "non-viable" persons—the elderly and the handicapped, for example.

Equity often extends *parens patriae* protection to unborn children regardless of gestational age, compelling, for example, blood transfusions for pregnant women to protect their unborn children. *See* Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham L. Rev. 807, 844-48 (1973).

Roe was, of course, inconsistent with the criminal laws of most states in 1973. *See* Linton, *Enforcement of State Abortion Statutes After Roe: A State-by-State Analysis*, 67 U. Det. L. Rev. 157, 255-57 (1990) (listing states). It was also inconsistent with the view of abortion that prevailed at the time the Fourteenth Amendment was adopted (*see Roe*, 410 U.S. at 175 n.1 (Rehnquist, J., dissenting) (listing abortion statutes in force at adoption of Fourteenth Amendment)), as well as with the roots of those statutes in early American and received English Common Law.[16] And *Roe* is still inconsistent with developing criminal law. *See, e.g., Minnesota* v. *Merrill*, 450 N.W.2d 318 (Minn.) (en banc), *cert. denied*, 110 S. Ct. 2633 (1990) (upholding homicide statute as

[16] *See Mills* v. *Commonwealth*, 13 Pa. 630, 633-34 (1850) ("The moment the womb is instinct with embryo life, and gestation has begun, the crime [of abortion] may be perpetrated . . . . There was therefore a crime at common law sufficiently set forth and charged in the indictment."); *State* v. *Slagle*, 83 N.C. 630, 632 (1880). *See also State* v. *Jones*, 2 Miss. (1 Walker) 39 (1820) (prosecuting slave owner for murder of slave; "the killing of a lunatic, an idiot, *or even a child unborn*, is murder, as much as the killing of a philosopher, and has not the slave as much reason as a lunatic, an idiot or *an unborn child*") (emphasis added).

These cases were based, ultimately, on the received English Common Law. *See, e.g.*, 1 W. Blackstone, *Commentaries* 129 ("Life is . . . a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb."); E. Coke, *Third Institute* 50 (1644) (abortion of a woman "quick with child" is a "great misprision"); 1 M. Hale, *History of Pleas of the Crown* 433 (1736) (abortion, though not murder or manslaughter, is a "great crime"); 1 W. Hawkins, *A Treatise of the Pleas of the Crown*, ch. 31 § 16 (7th ed. 1795) (agreeing with Coke).

applied to killing of unborn child); *In the Matter of Stefanel Tyesha*, C. Nos. 39872, 39813 (Supr. Ct. N.Y., App. Div. 1st Dept. May 23, 1990) (child abuse proceeding based on alleged injury to child *in utero* resulting from mother's ingestion of illegal drugs). Nor are these types of cases an entirely recent phenomenon. *See* Kader, *The Law of Tortious Prenatal Death Since Roe* v. *Wade*, 45 Mo. L. Rev. 639 (1980).

In short, *Roe* fails every test this Court has applied in determining when an otherwise questionable precedent deserves protection under the doctrine of *stare decisis*.

III. UPON RECONSIDERATION, *ROE* SHOULD BE OVERRULED

Roe is, in the last analysis, profoundly wrong. It should be reconsidered for the reasons set forth above. Upon reconsideration, it should be overruled for all the reasons enunciated by the United States in its briefs in Nos. 88-605 and 88-805, as well as by *amicus* in its prior brief in No. 88-605.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be affirmed, and *Roe* v. *Wade* should be overruled.

Respectfully submitted,

W. PATRICK DONLIN
Supreme Advocate
CARL A. ANDERSON*
Vice President for Public Policy
Knights of Columbus
1275 Pennsylvania Avenue, Suite 501
Washington, D.C. 20004
(202) 628-2355

* Counsel of Record

Dated: September 7, 1990

[illegible]

[illegible] Court of the United States

October Term, 1990

Dr. [illegible], et al.,

Petitioners,

v.

Dr. LOUIS W. SULLIVAN,
Secretary of Health and Human Services,

Respondent.

THE STATE OF NEW YORK, et al.,

Petitioners,

v.

Dr. LOUIS W. SULLIVAN,
Secretary of Health and Human Services,

Respondent.

Writs of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF OF THE AMERICAN ACADEMY OF MEDICAL ETHICS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

CAROLYN B. KUHL *
M. EDWARD WHELAN III
MUNGER, TOLLES & OLSON
355 South Grand Avenue
Thirty-First Floor
Los Angeles, California 90071
(213) 683-9100

Counsel for Amicus Curiae

* Counsel of Record

[illegible], D.C. 20001

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BRIEF OF THE AMERICAN ACADEMY OF MEDICAL ETHICS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

The American Academy of Medical Ethics is an educational and lobbying organization with approximately 20,000 physician members, incorporated to respond to the challenges to established medical ethics emerging in recent decades. The Academy adheres to the Hippocratic Oath in opposing abortion except to save the life of the mother. The Academy has previously pursued its interests before this Court through participation as *amicus curiae* in cases including *Webster v. Reproductive Health Services* (No. 88-605), *Turnock v. Ragsdale* (Nos. 88-790, 88-1309), and *Cruzan v. Director, Mo. Dept. of Health* (No. 88-1503).

The Academy addresses this Brief to the First Amendment claims made by Petitioners. The Academy submits this Brief in support of Respondent and asks the Court to affirm the decision of the United States Court of Appeals for the Second Circuit.

INTRODUCTION AND SUMMARY OF ARGUMENT

> "This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence. . . . [N]o legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving . . . abortion." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting).

In this case, Petitioners seek to distort this Court's First Amendment jurisprudence in furtherance of a policy favoring abortion. In concocting a First Amend-

[1] This Brief *Amicus Curiae* is filed with the consent of all parties to this proceeding. A letter from each attorney stating this consent has been filed with the Clerk of this Court.

ment challenge to regulations (under Title X of the Public Health Services Act, 42 U.S.C. § 300 *et seq.*) that implement Congress' decision to subsidize preventive family planning but not abortion, Petitioners adopt a twofold stratagem. First, they obscure and mischaracterize the Title X program and the regulations at issue. Second, they selectively cite and quote cases from various First Amendment contexts that are inapposite—*e.g.*, outright prohibitions or penalties on speech, taxation of the press, regulation of public forums. At the same time, they ignore controlling precedent that acknowledges the government's ability to choose when and how it will subsidize citizens' exercise of their constitutional rights. Petitioners' tactics should not be allowed to distort either the nature of the Title X regulations or settled First Amendment jurisprudence.

The Title X regulations challenged by Petitioners do not infringe their First Amendment rights. The regulations apply only to the Title X program and are designed to ensure that recipient organizations do not thwart the purposes of Title X by using Title X funds to *subsidize* their non-Title X abortion services. With respect to recipient organizations' activities outside the Title X program, the Title X regulations place no restrictions on abortion counseling, referral, advocacy or activities of any nature whatsoever, including performance of abortions. In short, the Title X regulations do not bar pro-abortion speech by Petitioners; rather, they merely refuse to *subsidize* it.

Petitioners' distortions of First Amendment jurisprudence are an effort to establish that Title X must be "viewpoint neutral". Petitioners therefore ignore the holdings of *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), and misconstrue *Regan v. Taxation Without Representation*, 461 U.S. 540 (1983). These cases establish that government may encourage citizens to exercise their constitutional rights, including their First Amendment rights, in a particular

way so long as it does not directly interfere with those rights. *Maher* and *Harris* establish specifically that government may validly promote childbirth over abortion. Instead of addressing these cases, Petitioners rely heavily on cases that involve outright bans on speech. Petitioners also rely heavily on cases applying a public forum analysis, but they do not even attempt to defend their assumption that the Title X program is in any sense a "forum" for speech. Title X plainly was not designed to provide an opportunity for citizens to debate the issue of abortion; it is a vehicle for the government to provide what it deems to be appropriate family planning services.

Most importantly, Petitioners' proposed regime of "viewpoint neutrality" would transform government as we know it and could be used to subvert the policy goals of nearly any government program. When the government subsidizes an anti-smoking campaign, must it also subsidize a pro-smoking campaign by cigarette manufacturers? When government funds programs designed to discourage drug use, must it also fund groups that advocate legalization of drugs? May it not, for example, limit drug treatment referrals to programs that do not use methadone? When Congress establishes a National Endowment for Democracy, 22 U.S.C. § 4411 *et seq.*, need it also establish a National Endowment for Communism or a National Endowment for Fascism?

Petitioners' revolutionary theory of viewpoint neutrality in government-funded programs would transform Title X into a reproductive Tower of Babel. If subsidization of "pro-choice" advocacy is constitutionally required, then certainly "pro-life" advocacy cannot be precluded from the program (as it now is). The regulations could not require that each project provide a broad range of family planning methods, 42 C.F.R. § 59.5(a)(1), because that would discriminate against the viewpoint of those who oppose artificial methods of birth control.[2]

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[2] The government noted in its brief below a United States Catholic Conference comment on the proposed rules stating that Cath-

Those who oppose *any* form of birth control could demand subsidy for a program that discourages contraceptive use. If subsidization of abortion counseling is constitutionally required, a grant applicant could argue that a full range of prenatal counseling and adoption counseling (perhaps extending until delivery) must be funded as part of the program. Under Petitioners' theories each of these situations would require a constitutional analysis under the First Amendment. Whether *any* government-funded family planning program could survive such regulatory restructuring and litigative machinations is questionable.

Nor do Title X regulations unconstitutionally restrict or penalize use of private funds for speech. The Title X regulations apply only to the Title X program, not to all the activities of the recipient organization: the organization remains free to use private funds to counsel or advocate respecting abortion outside the Title X program. Within the Title X program, the up-to-10% matching funds and grant-generated income that the recipient organization agrees to dedicate to the Title X program are effectively "public moneys" under *Regan*. Outside the Title X program, Petitioners' real complaint is that the Title X regulations properly prevent them from using Title X funds to cross-subsidize their non-Title X abortion activities and to solicit clients for their non-Title X abortion services.

COUNTERSTATEMENT OF THE CASE

Petitioners sow confusion about Title X and then attempt to exploit this confusion. In particular, four major distortions about Title X programs afflict their briefs. First and most generally, Petitioners blur the clear distinction between a Title X program and a recipient organization's other programs and activities. Second, in arguing that Title X impermissibly subsidizes childbirth over abortion, Petitioners mischaracterize the regulations' requirements. Third, Petitioners wrongly invoke the doctrine of informed consent by assuming that Title X counseling employees, rather than the non-Title X physician treating the woman's pregnancy, are responsible for ensuring informed consent for pregnancy treatment. Fourth, they garble the components of Title X funding in order to deny its essentially public nature.

olic organizations cannot become grantees "because of the statutory requirement that all grantees must provide a full range of contraceptive family planning." Brief for the Appellee at 54 n.41, *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989) (Nos. 88-6204 and 88-6206).

A. The Title X Regulations Apply Only To The Title X-Funded Program, Not To A Recipient Organization's Other Programs And Activities.

Title X is a spending program under which the federal government exercises its constitutional power to provide services related to preventive family planning and *not* services related to abortion. In enacting Title X, Congress specifically provided that "[n]one of the funds appropriated under [Title X] shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. This statutory exclusion means that "abortion is not to be encouraged or promoted in any way" by Title X. 116 Cong. Rec. 37375 (Nov. 16, 1970).

The Title X regulations draw a clear line between the funded Title X program and a recipient organization's other programs and activities. The Title X regulations apply only to the Title X program. 42 C.F.R. §§ 59.1, 59.2. They

> do not restrict the use of funds outside the Title X program or impose restrictions on funds provided under other federal programs. Nor do they prevent a woman from seeking and obtaining an abortion outside the Title X program. They thus make no attempt to establish abortion restrictions beyond the parameters of a Title X project.

53 Fed. Reg. at 2925. Thus, outside the funded Title X program, the Title X regulations place no restrictions on the rights of recipient organizations, to engage in pro-

abortion counseling, referral, advocacy, or activities of any nature, including performance of abortions.

Petitioners [3]—especially the *Rust* Petitioners—attempt to blur this clear line between a recipient organization's Title X program and its other programs and activities in an apparent attempt to exaggerate the impact of the Title X regulations. For example, they confusingly employ such terms as "Title X clinics," "Title X agencies" and "clinics"—sometimes apparently referring to the Title X program and sometimes to the recipient organization as a whole, depending on which suits their purposes.[4] Likewise, they sometimes use the term "non-Title X sources" to refer to the matching funds and grant-related income that are part of Title X, and other times use the same term to refer to funds outside the scope of Title X.[5] Nowhere do they clearly acknowledge that the Title X regulations impose no restrictions on recipient organizations' non-Title X programs and activities.

B. Petitioners Distort The Regulations' Requirements.

In attempting to support their contention that the Title X regulations impermissibly subsidize speech about childbirth over speech about abortion, Petitioners mis-

[3] The Brief for Petitioners in *Rust v. Sullivan* (No. 89-1391) is cited herein as "Rust Brief at ——." The Brief for Petitioners in *New York v. Sullivan* (No. 89-1392) is cited herein as "State Brief at ——."

[4] *See, e.g.*, Rust Brief at 3 n. 5 ("only 33% of Title X agencies reported that Title X grants were their mean largest single source of support"); *id.* at 4 (listing medical services, including "abortion services," provided by "Title X clinics"); *id.* at 23 (alleging that Title X regulations set "trap" for patients at a "Title X clinic"); *id.* at 28-29 (discussing facilities and resources of "Title X clinics"); *id.* at 30 (regulations do not permit "staff at the Title X clinic" to advise of abortion services).

[5] *Compare, e.g.*, Rust Brief at 12 (referring to "such non-Title X sources [*sic*] as matching funds, patient fees, and other reimbursements or monies"), *with id.* at 27 n. 27 (referring to funding of abortion counseling by "non-Title X sources" such as Title V of the Social Security Act).

characterize the specific regulations that they challenge in a variety of ways.

Petitioners contend that Section 59.8 "suppress[es] speech about abortion and compel[s] speech about childbirth." State Brief at 32. This extravagant rhetoric is off the mark. In the first place, the Title X regulations govern merely what Title X *subsidizes*; they do not suppress any speech about abortion. Nor do they require that Title X programs express any "anti-abortion ideology." State Brief at 32. Petitioners seize on and distort an *example* in the Title X regulations that provides that a project counselor *permissibly* responds to a request for an abortion referral by stating that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." 42 C.F.R. § 59.8(b)(5). Contrary to Petitioners' contention (Rust Brief at 7; State Brief at 5-6, 33), this response is not mandatory but is rather merely an illustration of a permissible response. Moreover, the statement that abortion is "not . . . appropriate" simply delineates the scope of the Title X program. As is clear from the regulations, the counselor need only refrain from counseling about or referring for abortion, and need not express any anti-abortion ideology.

Likewise, Petitioners' claim that Section 59.8 compels speech about "childbirth" (State Brief at 32) and "compel[s] the clinic or counselor to provide information that promotes continuing a pregnancy to term" (Rust Brief at 11) is grossly overstated. Section 59.8(a)(2) provides merely for transitional counseling and referral for clients diagnosed as pregnant, just as Title X regulations provide for appropriate referrals for other medical conditions. 42 C.F.R. § 59.5(b)(1); 53 Fed. Reg. at 2937. The referral list of appropriate prenatal care providers may include providers who also perform abortions. 42 C.F.R. § 59.8(a)(3).[6] Provision of basic health informa-

[6] Petitioners contend that the referral list "must include providers who do not perform abortions—regardless of their medical

tion (for example, that alcohol consumption poses risks to the fetus) as part of the referral operates to *preserve a pregnant woman's options* until such time as she consults with a *treating* physician concerning her pregnancy. Absent this transitional counseling and referral, a pregnant woman might discover at the time of such consultation that she had unknowingly taken actions that risked the health of her unborn child, and might feel compelled to abort a child that she would otherwise have welcomed. With the benefit of this transitional counseling and referral, the woman retains the option, after consulting with a treating physician, to choose between carrying and aborting her child.

Petitioners also mischaracterize Section 59.9. Section 59.9 requires that a Title X program "have an objective integrity and independence from" a recipient organization's pro-abortion activities. 42 C.F.R. § 59.9. As discussed below (*infra* at 29), this regulation is properly designed to ensure that Title X funds are not used to subsidize abortion services. Section 59.9 does not require "complete," "wholesale" physical and financial separation. State Brief at 6; Rust Brief at 5. Rather, Section 59.9 contemplates a comprehensive multi-factored analysis of *degrees* of separateness in order to determine whether the Title X program has objective integrity and independence.

Finally, Section 59.10 prohibits use of Title X funds for pro-abortion advocacy, litigation and lobbying. This prohibition reflects the fact that Title X is a government program that provides services, not a forum for speakers.

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qualifications." State Brief at 5. This contention has no basis in the regulations and is rebutted by the very authority cited in purported support: if a provider is not medically qualified, it is not an "available provider" of "appropriate" services. 42 C.F.R. § 59.8(a)(3). Nor is referral of a woman for prenatal care done "regardless of her medical circumstances," as Petitioners also allege. State Brief at 33. Section 59.8 provides for emergency referrals for abortion in the case of an ectopic pregnancy or other life-threatening condition.

As the Secretary has made clear, Title X funds also may not be used for anti-abortion advocacy, litigation and lobbying. *E.g.*, Brief for the Appellee at 57 n.43, *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989) (Nos. 88-6204 and 88-6206). Section 59.10 expressly addresses pro-abortion activities in order to confront the abuses that actually have been encountered. *See* 53 Fed. Reg. at 2923-25.

C. The Title X Regulations Do Not Affect The "Informed Consent Dialogue" About Treatment Of Pregnancy.

Petitioners complain that the Title X regulations disrupt a supposed "informed consent dialogue" between a Title X employee and a pregnant client by excluding discussion of abortion. State Brief at 37, 39. Petitioners' complaint is illusory. As Title X does not provide *medical treatment* for pregnancy, the responsibility for ensuring informed consent for any subsequent treatment lies not with Title X employees, but with the non-Title X physician who treats the woman's pregnancy.[7] Title X employees neither can nor should obtain a pregnant client's consent to non-Title X medical treatment. In short, the informed consent dialogue about medical treatment of pregnancy takes place outside the Title X program, and the Title X regulations do not affect or restrict it in any way. (For further discussion of this point, see Brief Of The Association Of American Physicians And Surgeons As *Amicus Curiae* In Support Of Respondent, Section IV (hereinafter cited as AAPS *Amicus Brief*)).

D. Petitioners Misrepresent The Nature Of Funding Of Title X Programs.

As discussed below (*infra* at 26-28), Title X funding is essentially public in nature. As part of their effort to obscure this fact, Petitioners' briefs create confusion

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[7] Conversely, in connection with the provision of contraceptive services, the Title X regulations do permit factual information about abortion that enables the client to assess the relative risks and benefits of various contraceptive methods. 42 U.S.C. § 59.8(b)(6); 53 Fed. Reg. at 2932.

about the funding of Title X programs—a confusion that is also reflected in the First Circuit majority's opinion in *Massachusetts v. HHS*, 899 F.2d 53 (1st Cir. 1990) (*en banc*). For example, Petitioners use the phrase "non-Title X funds" to refer to the matching funds and grant-related income dedicated to the Title X program. *E.g.*, Rust Brief at 25. Likewise, by comparing the amount of Title X grant funds to the *overall* operating budget of recipient organizations (including their non-Title X programs and activities), Petitioners leave the false impression that Title X grant funds account for far less than 10% of the costs of the Title X programs. *See, e.g.*, Rust Brief at 3 n.5; State Brief at 42 & n.44. Accordingly, it is necessary to review precisely what Title X and its regulations provide regarding funding.

Section 59.2 of the Title X regulations defines Title X project funds to "include all funds allocated to the Title X program, including but not limited to grant funds, grant-related income or matching funds." 42 C.F.R. § 59.2. This definition is designed to ensure that no funds allocated to a Title X program are used to promote abortion, because provision of Title X grant funds to such a program would violate 42 U.S.C. § 300a-6. *See* 53 Fed. Reg. at 2927.

"Grant funds" are funds appropriated by the federal government under Title X. Under 42 U.S.C. § 300a-4(a), grants generally must be for *at least* 90% of a program's estimated costs.[8] *See* 42 C.F.R. § 59.11(b) (grant generally must "be made for not less than 90 percent of the

[8] The State Petitioners somehow read this same Section 300a-4(a) as providing a 90% ceiling on the federal grant fund share of the Title X program costs, when it in fact provides a floor. *See* State Brief at 42. Likewise, the First Circuit majority misread this same statutory section in support of its mistaken assertion that Title X projects "are required to provide nonfederal 'matching funds' of *at least* 10%" of the costs. *Massachusetts v. HHS*, 899 F.2d at 55 (emphasis added).

Title X project's costs," as estimated by the Secretary). Thus, other sources of Title X program funds will account for *no more than* 10% of the program costs.

"Matching funds" are funds that the grantee agrees to dedicate to the Title X program. General HHS regulations, 45 C.F.R. § 74.50 *et seq.*, govern these matching funds. *See* 42 C.F.R. § 59.215. When the terms of the grant permit, the matching fund share can be satisfied by grant-related income generated by the Title X project. 45 C.F.R. § 74.53(c).

"Grant-related income," as defined by general HHS regulations, includes income received from activities "part or all of the cost of which" is funded by a federal grant, including "income in the form of fees for services performed" during the grant period. 45 C.F.R. § 74.41(a); *see* 42 C.F.R. § 59.215. Thus, income generated by the Title X project, including fees paid by Title X clients, constitutes grant-related income. Unless the terms of the grant otherwise provide, grant-related income must be used to offset the allowable costs of the program (just as gross income normally offsets gross costs). 45 C.F.R. § 74.42(c)(1).[9] Alternatively, if the terms of the grant permit, grant-related income can count towards a matching requirement, 45 C.F.R. § 74.42(d), or can be used to expand the program beyond allowable costs, *id.* § 74.42(e).

[9] Thus, if a program incurs $100,000 of gross allowable costs, generates $10,000 in grant-related income, and has a 90% federal funding share and a 10% matching requirement, the $10,000 in income is deducted from the $100,000 of costs to determine net costs of $90,000. The 90% federal funding share applies to this $90,000 net figure (not the $100,000 gross figure), so that the federal funding share is $81,000 (not $90,000). 45 C.F.R. § 74.42(c)(2).

ARGUMENT

I. THE TITLE X PROGRAM DOES NOT VIOLATE THE FIRST AMENDMENT RIGHTS OF THOSE WHO CHOOSE TO PARTICIPATE IN THE PROGRAM.

A. The Government's Title X Funding Decision Is Subject To Rational Basis Scrutiny And Meets This Standard.

Petitioners' briefs ignore the holdings of *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980).[10] But those precedents are central to the proper analysis of the First Amendment issues in this case. Petitioners have taken arguments made under the Fourteenth Amendment in *Maher* and *Harris* (arguments that did not succeed in those cases) and have restated them as First Amendment arguments. Petitioners fail to recognize, however, that the principle of *Maher* and *Harris*—that government may encourage citizens to exercise their rights and freedoms in a particular way so long as it does not directly interfere with protected activity—applies with equal force to First Amendment activity. *Maher*'s rationale in fact is based on earlier authority implicating free speech rights, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and subsequent Supreme Court authority adopts *Maher*'s analysis in upholding a government decision not to subsidize certain speech, *Regan v. Taxation Without Representation*, 461 U.S. 540 (1983).

In *Maher*, the Court addressed a challenge to a Connecticut regulation limiting Medicaid benefits for first trimester abortions to those that are medically necessary, even though the program subsidized medical expenses incident to pregnancy and childbirth. The regulation was challenged under the Equal Protection Clause of the Fourteenth Amendment on the ground that it allegedly

[10] Indeed, the Rust Brief cites *Maher* and *Harris* only once in passing. Rust Brief at 35.

impinged upon a fundamental right—the right to abortion—protected by the Constitution. In rejecting the challenge, this Court emphasized "a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." 432 U.S. at 475.

The *Maher* Court derived this principle in part from *Meyer v. Nebraska*, 262 U.S. 390 (1923). Although *Meyer* struck down a state law making it a criminal offense to teach foreign languages to young children, the Court in *Maher* recognized that *Meyer* did not "den[y] to a State the policy choice of *encouraging* the [State's] preferred course of action." *Maher*, 432 U.S. at 476-477.

> Indeed, in *Meyer* the Court was careful to state that the power of the State "to prescribe a curriculum" that included English and excluded German in its free public schools "is not questioned." 262 U.S. at 402.

Maher, 432 U.S. at 477. The teaching of foreign languages penalized by state law in *Meyer* is speech protected by the First Amendment.[11] Yet in *Maher* this Court did not hesitate to draw from *Meyer* the principle that government encouragement of one course of action over another, constitutionally protected course of action is permissible. *Harris v. McRae* confirms this principle. "Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement." *Harris*, 448 U.S. at 318. Whether the protected activity is speech about abortion or a woman's right to obtain an abortion, the constitutional analysis is the same: The government's decision to *encourage* one course of action over another constitutionally protected course of action need only have a rational basis. *Maher*, 432 U.S. at 478.

[11] *See* L. Tribe, *American Constitutional Law* 789 (2d ed. 1988) (citing *Meyer* as a case of government abridgment of speech).

Regan v. Taxation Without Representation, 461 U.S. 540 (1983), confirms the applicability of the *Maher* analysis to government decisions not to subsidize some forms of speech. *Regan* rejected a First Amendment challenge to Internal Revenue Code provisions which disqualify an organization from receiving tax-deductible contributions if the organization engages in substantial lobbying. *Regan* expressly drew upon the principles of *Maher* and *Harris* in rejecting the argument that strict scrutiny should be applied to these tax provisions:

> We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny . . . . *Harris v. McRae*, *supra*, and *Maher v. Roe*, 432 U.S. 464 (1977), considered legislative decisions not to subsidize abortions, even though other medical procedures were subsidized. We declined to apply strict scrutiny and rejected equal protection challenges to the statutes.
>
> The reasoning of these decisions is simple: "although government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation." *Harris*, 448 U.S. at 316.

Regan, 461 U.S. at 549-550 (bracketed phrases in original). *Regan* therefore applied a rational basis test to the government's decision to subsidize some speech but not other speech. *Id.*

Under the analysis settled by *Meyer*, *Maher*, *Harris* and *Regan*, the regulations at issue here permissibly encourage by subsidy some forms of speech over others but do not prohibit or interfere with speech. Petitioners object to provisions of the regulations prohibiting Title X programs from "counseling concerning the use of abortion," 42 C.F.R. § 59.8(a)(1); encouraging, promoting, or advocating abortion, *id.* § 59.10(a); and "assist[ing] women to obtain abortions or increas[ing] the availability or accessibility of abortion," *id.* Rust Brief at 15. But all of these are restrictions on *subsidized* counseling and advocacy in a federal program, not general restrictions on speech. Just as the government may fix the curriculum in publicly funded schools so long as it does not prohibit subjects from being taught outside those schools, *Maher*, 432 U.S. 476-477 (discussing *Meyer*), the government may specify the scope of counseling services in the Title X program. Similarly, "Congress could, for example, grant funds to an organization dedicated to combating teenage drug abuse, but condition the grant by providing that none of the money received from Congress should be used to lobby state legislatures." *Regan*, 461 U.S. at 548. There is no constitutional distinction between imposing a condition that funds not be used to lobby and imposing a condition that funds not be used to counsel concerning abortion or to advocate abortion.[12]

Although the *Maher* Court recognized that the government's refusal to fund abortions "may [make] childbirth a more attractive alternative, thereby influencing the woman's decision," it nonetheless subjected the funding program only to rational basis scrutiny because the government imposed "no restriction on access to abortions that was not already there." 432 U.S. at 474. It follows that even if the government's refusal to fund abortion counseling means that information concerning childbirth is more readily available than information concerning abortion,[13] the government's funding decision also is sub-

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[12] Indeed, lobbying is a form of political speech and as such is entitled to the highest degree of First Amendment protection. "The First Amendment affords the broadest protection to political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (citation omitted).

[13] Because Title X is limited to pre-conceptional services, 42 C.F.R. § 59.2 (definition of "family planning"), the program does not furnish services related to childbirth. Only in the context of a referral out of the Title X program is a pregnant woman given transitional information designed to preserve her options until she seeks further medical help. *Id.* § 59.8(a)(2). *See supra* at 7-8. Thus, the Title X program furnishes information concerning childbirth only in a very indirect and limited way.

ject only to rational basis scrutiny because it places no restriction on access to abortion information outside the Title X program.

Maher and *Harris* further establish that a government decision to encourage childbirth over abortion is rationally related to a constitutionally permissible purpose. *Maher* held that the "State unquestionably has a 'strong and legitimate interest in encouraging normal childbirth,' . . . an interest honored over the centuries." 432 U.S. at 478 (citation omitted). *Harris*, following *Maher*, made it unmistakably clear that government may single out abortion as a medical procedure it will not encourage: "Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." 448 U.S. at 325. The federal government's decision not to fund abortion information services (as well as abortions themselves) rationally promotes the government's interest in encouraging childbirth over abortion.

B. Title X Does Not "Discriminate Invidiously" In A Way That "Aims At The Suppression Of Dangerous Ideas".

While pointedly ignoring the principles articulated in *Meyer*, *Maher*, *Harris* and *Regan*, Petitioners quote out of context, and make the centerpiece of their argument, language from *Regan* that actually is directed toward the very different situation where government seeks to suppress certain ideas by, for example, denying a citizen a generally available independent benefit because of his speech.

In concluding that "Congress has not violated TWR's First Amendment rights by declining to subsidize its First Amendment [lobbying] activities," *Regan* notes that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to ' "ai[m] at the suppression of dangerous ideas." ' " *Regan*, 461 U.S. at 548 (quoting *Cammarano v. United States*, 358 U.S. at 498, 513 (1959), in turn quoting *Speiser v. Randall*, 357 U.S. 513, 519 (1958)). This

"invidious discrimination" language from *Regan* does not bar mere decisions to subsidize one viewpoint and not another. If it did, *Maher* and *Harris* would have to be overruled because they permit government to support one constitutionally protected choice and not another. Far from overruling *Maher* and *Harris*, *Regan* draws its rationale from them. *See* 461 U.S. at 549-50.

The "invidious discrimination" language on which Petitioners rely is aimed at a much more aggressive government action, as the very words "suppression" and "dangerous ideas" themselves suggest.[14] *Regan* draws the "suppression of dangerous ideas" phrase from *Speiser v. Randall*, 357 U.S. 513 (1958), which struck down a California law that *generally* denied all tax exemptions to persons who refused to provide an oath of loyalty. *Regan* explains that the rule of *Speiser* is limited to situations where government seeks to deny a citizen an "independent benefit" because of the citizen's exercise of a constitutionally protected right, but does not apply where "Congress has merely refused to pay" for the constitutionally protected activity "out of public moneys." 461 U.S. at 545. Here, as in *Regan*, Congress merely has refused to pay for abortion counseling out of public monies.

Title X has no coercive effect on private speech, as defined in *Speiser* and *Regan*. The law at issue in

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[14] The Rust Brief cites *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987), as support for Petitioners' assertion that viewpoint neutrality is required in government-funded programs. But *Arkansas Writers' Project* was decided on the basis of principles concerning taxation of the press—principles that are simply inapplicable to government-funded programs. *Arkansas Writers' Project* struck down on First Amendment grounds a state sales tax that applied to all magazines except religious, professional, trade and sports journals. 481 U.S. at 224. The principle governing the decision is that "selective taxation of the press—either singling out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the State." *Id.* at 228. Thus the rationale of the case is explicitly limited to situations involving taxation of the press.

Speiser, which denied tax exemptions generally, "necessarily [had] the effect of coercing the claimants to refrain from the proscribed speech." 357 U.S. at 519. The Title X program, by contrast, leaves agencies that seek to counsel concerning abortion or to promote abortion free to do so outside of Title X. Such agencies also do not lose the opportunity to participate in the Title X program by virtue of any pro-abortion activities they engage in outside the program.

Moreover, *Regan*'s caveat is directed at "invidious" discrimination in subsidies. A government preference for childbirth over abortion is in no sense invidious discrimination. *Maher* validated government's right to "make a value judgment favoring childbirth over abortion," 432 U.S. at 474 (citation omitted), and *Harris* recognized that abortion is a unique medical procedure because of its "purposeful termination of a potential life." 448 U.S. at 325. In light of these precedents, a subsidy that favors childbirth over abortion cannot be said to create a "suspect" or "invidious" classification.

Finally, Title X does not implement the government's preference for childbirth in a way that threatens to suppress discussion of abortion. Both anti-abortion and pro-abortion advocacy, litigation and lobbying with Title X funds is forbidden. See *supra* at 8-9. It is only in the requirements for transitional referrals out of the Title X program after a woman becomes pregnant that the regulations even arguably can be said to favor childbirth over abortion. The very limited amount of information that is furnished about prenatal care in the context of that referral hardly can be said to tip the scales so far in favor of childbirth as to constitute "suppression" of the idea of abortion. Similarly, the fact that the government refrains from providing referrals for the sole purpose of abortion[15] does not suppress information

[15] The regulations allow referrals to health care providers that provide prenatal care and also provide abortions. 42 C.F.R. § 59.8(b)(4).

about abortion. The private sector functions vigorously in furnishing abortion information and services, as a glance at almost any yellow pages will reveal.[16]

C. Petitioners' Arguments That A "Viewpoint Neutrality" Test Should Be Applied to Government Funding Decisions Are Fundamentally Unsound.

As discussed above, *Regan* in no way requires that government funding decisions be neutral as between competing policy viewpoints. Petitioners, however, seek support for a proposed regime of viewpoint neutrality by selective quotation and citation of cases dealing with public forum doctrine, often without identifying them as public forum cases.[17] But Petitioners do not even attempt to address the fundamental issue of whether a Title X program is in any sense a "forum" for speech.

[16] The *Rust* Brief refers to the views of commentators that express concern over government expression that "approaches monopolization of the marketplace of ideas." Rust Brief at 24 n.39. The only support cited from the cases of this Court is footnote 8 in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3052 (1989), where the Court notes that a ban on use of state facilities to perform abortions might call for a "different analysis" if a particular State had socialized medicine and all of its hospitals and physicians were publicly funded." It is ludicrous to suggest that the Title X program creates a monopoly on information about abortion when the program is designed precisely to have nothing to do with abortion. There is no contention that abortions are not available in the private sector. Abortion providers also make abortion information readily available.

[17] Petitioners likewise improperly rely on cases involving outright bans or penalties on speech. For example, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (cited in Rust Brief at 9 n.29), involved a ban on drug advertising. *Schacht v. United States*, 398 U.S. 58 (1970) (cited in Rust Brief at 18 n.28), overturned a law making it a crime for an actor to wear a military uniform in a play if the role was critical of the military. *Boos v. Barry*, 485 U.S. 312 (1988) (cited in Rust Brief at 18), involved criminal sanctions for picketing outside an embassy. *Wooley v. Maynard*, 430 U.S. 705 (1977) (cited in Rust Brief at 14 and State Brief at 34), overturned a criminal conviction of a person who expressed himself by covering the New Hampshire state motto on his license plate.

The Title X program is not a "forum" for speech, public, nonpublic or otherwise. First, public forum analysis applies only where a speaker seeks access to government's real or physical property.[18] "[A] speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns" in the context of public forum analysis. *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 801 (1985) (charitable solicitation in federal workplace). Thus, public forum analysis deals with the allocation of situses under government control. Petitioners here do not seek access to physical property belonging to or used by the government. Rather, they seek a monetary grant or subsidy. The public forum cases do not purport to address issues of access to government subsidies or programs; those issues are addressed by *Maher*, *Harris* and *Regan*, as discussed above.

Second, public forum analysis applies only in those situations where the government has tolerated or created a channel for expressive activity to function separate from, and without the imprimatur of, the voice of the government itself. Each type of forum recognized by the Court is characterized by debate and communication of ideas that are the speakers' own, by voices that are not identified with the government.[19]

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[18] *See, e.g., Boos v. Barry*, 485 U.S. 312 (1988) (streets or sidewalks); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (state fair); *Widmar v. Vincent*, 454 U.S. 263 (1981) (state university meeting facilities); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (internal mail system within a public school); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (advertising spaces on city-owned buses).

[19] A "quintessential public forum" is one that has "by long tradition or by government fiat . . . been devoted to assembly and debate." *Perry Education Ass'n*, 460 U.S. at 45. A limited public forum is created "by government designation of a place or channel of communication . . . for use by certain speakers, or for the discussion of certain subjects." *Cornelius*, 473 U.S. at 802. In those cases where this Court has recognized a nonpublic forum, the government had created a system of communication for persons who were not speaking on behalf of the government. *See, e.g., Cornelius, supra* (system of charitable solicitation of federal employees by organizations outside government); *Perry Education Ass'n, supra* (school mail system used by teachers to send personal messages and by outside groups with permission); *Lehman, supra* (advertising space on public buses); *Greer v. Spock*, 424 U.S. 828 (1976) (outside speakers invited to military base).

By contrast, the Title X program was not designed to facilitate communication of the ideas of persons who do not speak for the government. It is not designed as a channel for expressive activity, but rather as a program to provide "family planning methods and services." 42 U.S.C. § 300(a). And it is not designed to accommodate expression of a non-government persons' views on family planning generally (*e.g.*, whether artificial contraceptives are or are not appropriate or whether abortion is or is not an appropriate method of family planning). Rather, it is a government program for delivery of services that the government has decided are appropriate. The "forum" for debate of the government's policy choices was the Congress. "Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer . . . ." *Harris*, 448 U.S. at 318.

Petitioners' proposal that federal programs be viewpoint neutral is so extreme that even they cannot apply it consistently. Petitioners themselves concede that some viewpoints can be removed from the Title X program without constitutional difficulty. Petitioners appear to accept the notion that abortion counseling can be confined to "nondirective counseling." *E.g.*, Rust Brief at 2. But "nondirective counseling" (if it means anything) must mean that patients are neither told that abortion is never appropriate nor are advised that abortion is the best option in their circumstance. Thus, "nondirective counseling," a limitation which Petitioners do not challenge, itself involves the elimination of some viewpoints.[20]

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[20] Petitioners likewise concede that the regulations requiring "nondirective counseling" did not permit pro-life counseling centers to participate in the Title X program. Rust Brief at 16 n. 27.

Petitioners' lapses of logic derive from the more basic problem that application of their proposed doctrine of viewpoint neutrality would transform government as we know it. It has never been suggested that the federal government must allow any view to be expressed as part of a government program or that it can only fund programs expressing every possible viewpoint. When Congress establishes a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U.S.C. § 4411(b), it does not also have to fund a National Endowment for Communism or a National Endowment for Fascism. If government funds programs to discourage cigarette smoking, it does not also have to fund programs to promote smoking. So long as citizens are free to express their disagreement with government policy, government is free to adopt and implement constitutionally permissible policies even though that means subsidizing one viewpoint and not another.[21]

D. This Court Has Never Held That Expression Of Viewpoints Within The Doctor-Patient Relationship Is Entitled To Special Protection.

Although they cite no authority (except Plato) in support of the notion, Petitioners seem to argue that "the speech of a doctor or counselor with her patient" is entitled to special First Amendment protection. Rust Brief at 20-24. But the Constitution creates no recognition of one profession, or of the professions generally, as entitled to greater First Amendment rights.

It has never been thought that doctors' speech to patients may not be regulated. Such a notion surely would eliminate a whole area of tort law. Doctors in fact are

[21] *See* L. Tribe, *American Constitutional Law* 807 (2d ed. 1988) ("The first amendment does not, for example, prevent government from promoting respect for the flag by proclaiming Flag Day or by using public property to display the flag. Those who disdain the national symbol may express that view but may not silence government's affirmation of national values, nor may they insist that government give equal circulation to their viewpoint . . . .")

tightly constrained in what they may or may not say to a patient. A doctor may truly believe that giving a particular warning about a prescribed medicine or procedure is not in the patient's best interest, but if he neglects to give the warning he may be subject to liability. This Court has recognized that the government has a strong interest in preserving the health of its citizens, *see, e.g., Cruzan v. Director, Mo. Dept of Health*, 58 U.S.L.W. 4916, 4920-4921 (U.S. June 26, 1990), and few states have hesitated to exercise those interests by regulating the conduct of the medical profession, including its communications with patients.[22]

This case is not one where "the State requires [the physician] to communicate its ideology." *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 472 n.16 (1983) (O'Connor, J., dissenting). As noted by Justice O'Connor's dissenting opinion in *Akron*, such concerns are raised by cases such as *Wooley v. Maynard*, 430 U.S. 705 (1977), where a statute "in effect require[d] that [a person] use [his] private property as a 'mobile billboard' for the State's ideological message." 430 U.S. at 715. The Title X regulations impose no such general requirement on physicians. Rather, the regulations apply only to those physicians who choose to participate in the Title X family planning program. There simply is no compelled speech.

Even for physicians who choose to participate in the government program, the regulations do not require any communication of a government "ideology." The only required communication of which Petitioners complain

[22] For example, California requires a "standardized written summary" to be given a patient being treated for breast cancer covering "the advantages, disadvantages, risks and description of the procedures with regard to medically viable and efficacious alternative methods of treatment." Failure to provide the summary constitutes "unprofessional conduct." Cal. Health & Safety Code § 1704.5 (West 1990). New York has a similar requirement. N.Y. Pub. Health Law § 2404 (McKinney Supp. 1990). *See generally* authorities cited in AAPS *Amicus* Brief, Section IV.

comes in the context of the post-conception transitional referral. The provision of a "list of available providers that promote the welfare of mother and unborn child," 42 C.F.R. § 59.8(a)(2), does not involve communication of medical advice at all, nor does it involve the Title X clinician in communicating any government "ideology" on abortion. Telling a patient that the Title X program does not give referrals to clinics that only provide abortion services is no different from telling a patient that the Medicaid program does not pay for abortions. *See Harris, supra.* The requirement that a physician provide prenatal health information in the context of the referral merely preserves the patient's options until she decides where to seek further medical care. It does not involve communication of an "ideology" for a physician to tell a woman that smoking, drinking, drugs, or exposure to rubella may injure the fetus.

Finally, "the constitutional entitlement of a physician who administers medical care to an indigent woman is no broader than that of his patient." *Harris*, 448 U.S. at 318 n.21. While Petitioners complain that an indigent woman might not receive information concerning abortion if that information is not provided in the Title X program, they ignore the fact that *Maher* and *Harris* explicitly recognized that refusal to fund abortions might leave an indigent woman no alternative but to carry her child to term. *Maher*, 432 U.S. at 474 ("indigency . . . may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions"); *Harris*, 448 U.S. at 316-17. As in *Maher* and *Harris*, the regulation "has imposed no restriction on access to abortions that was not already there," 432 U.S. at 474, and is constitutionally permissible.[23]

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[23] Petitioners attempt to argue that the regulations mislead the Title X client into believing that she is receiving full information about options for abortion. In fact, the regulations do precisely the opposite. A woman who asks for abortion information is to be told that the Title X program "does not counsel or refer for abortion." If at any other point during counseling the Title X clinician believes that a woman should be told that she is not being given information about abortion, nothing in the regulations prevents the clinician from saying so. Indeed, the Title X regulations operate to make clear from the outset that the scope of Title X does not extend to abortion counseling or referral.

As described above, n.7 *supra*, information concerning abortion may be provided in the context of a discussion of the relative safety of various contraceptive methods.

II. THE TITLE X REGULATIONS DO NOT UNCONSTITUTIONALLY RESTRICT OR PENALIZE USE OF PRIVATE FUNDS.

A. The Title X Regulations Permissibly Restrict Use Of The Matching Funds And Grant-Related Income That Supplement The Direct Federal Funding Of 90% Of The Costs Of Title X Programs.

Purporting to rely on *FCC v. League of Women Voters*, Petitioners contend that the Title X regulations violate the First Amendment by restricting pro-abortion speech funded by the recipient's "own private funds"—by which Petitioners mean the matching funds and grant-related income that offset no more than 10% of the estimated net costs of each Title X program. Rust Brief at 12; *see id.* at 25-27; State Brief at 46 n.50. The First Circuit majority in *Massachusetts v. HHS*, 899 F.2d 53 (1st Cir. 1990) (en banc), identified this argument as the fundamental ground on which it disagreed with the Second Circuit ruling now before the Court. *Id.* at 71. Petitioners, and the First Circuit, incorrectly apply *League of Women Voters* and *Regan*.

In *League of Women Voters*, the Court held that Section 399 of the Public Broadcasting Act of 1967 violated the First Amendment by forbidding any noncommercial educational bradcasting station that received a grant from the Corporation for Public Broadcasting ("CPB") from engaging in editorializing. In determining that Congress had not merely exercised its spending power to refrain from subsidizing public broadcasting editorials, the Court emphasized that under Section 399, "a non-

commercial educational station that receives *only 1%* of its overall income from CPB grants is barred absolutely from all editorializing." 468 U.S. at 399-400 (emphasis added). Because the ban on editorializing applied to *all* of the station's activities, "[t]he station has no way of limiting the use of its federal funds to all noneditorializing activities, and, more importantly, it is barred from using even wholly private funds to finance its editorial activity." *Id.* at 400.

The Title X regulations are fundamentally distinguishable in two separate and sufficient respects from the statute at issue in *League of Women Voters*. First, whereas the statute in *League of Women Voters* leveraged a 1% federal grant into a bar on editorializing by the *entire* broadcasting station, the Title X regulations apply only to the Title X-funded program operated by the recipient organization. They do not restrict any of the organization's other programs or operations. The recipient organization therefore is able to "limit[] the use of its federal funds to [Title X] activities." It is *not* "barred from using even wholly private funds to finance" its pro-abortion activities outside the Title X program. Accordingly, even if a portion of Title X funds might somehow be deemed "wholly private," such portion may be subjected to Title X restrictions. *League of Women Voters*, 468 U.S. at 400; *see also Regan*, 461 U.S. at 551-553 (Blackmun, J., concurring) (restriction preventing Section 501(c)(3) organization and its Section 501(c)(4) affiliate from spending on lobbying any portion of individual tax-deductible contributions to the Section 501(c)(3) organization is permissible since the Section 501(c)(4) affiliate can use other funds to lobby).

Second, the Title X matching funds and grant-related income that supplement the direct 90% federal grants are more properly characterized as "public moneys" rather than "wholly private funds," and restrictions on use of these Title X funds are permissible. Any other conclusion would permit a participant in any federal

matching program—who has agreed to dedicate certain limited funds to that program—to dilute or subvert the purposes of the program.

In *Regan*, the Court, upholding the requirement that a Section 501(c)(3) organization not engage in substantial lobbying in order to qualify to receive tax-deductible contributions, held that this requirement did not penalize the right of the organization to lobby. Rather, "Congress has merely refused to pay for the lobbying out of *public moneys*," 461 U.S. at 545 (emphasis added). The Court's ruling in *Regan* is instructive in that the Court treated the entirety of tax-deductible contributions received by the organization from *private* individuals as "*public* moneys" because those contributions had the impetus of a substantial federal subsidy. Thus, the Court first recognized that "[tax-d]eductible contributions are similar to cash grants of the amount of a *portion* of the individual's contribution." 416 U.S. at 544 (emphasis added). It then characterized as "public moneys" not only that *portion* of the individual's contribution that was similar to a cash grant (i.e., the amount by which the individual's tax burden was lessened), *but rather the entire contribution.*[24] *Id.* at 545.

As in *Regan*, and unlike in *League of Women Voters*,[25] the Title X matching funds and grant-related income are

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[24] In contrast to the Court's analysis in *Regan*, one might have argued that a $100 contribution by an individual in the 28% tax bracket comprised a $28 cash grant by the government and a $72 private contribution by the individual, and that Congress should not be able to prohibit a Section 501(c)(3) organization from using the $72 "private" contribution for lobbying. But the Court properly did not adopt such an analysis, which ignores, *inter alia*, the impetus that the substantial federal subsidy—in the form of tax-deductibility—provided for the seemingly private portion of the contribution.

[25] The CPB grants in *League of Women Voters* could amount to as little as 1% of a station's overall income, 468 U.S. at 399-400, and were not structured in a manner (e.g., tax-deductibility or matching program) that inherently provided impetus for private contributions.

not "wholly private funds" since they benefit from the impetus of the federal government's direct grant of at least 90% of the costs of Title X programs. Indeed, these moneys are far more clearly "public" than the "public moneys" in *Regan* for several reasons.

First, the Title X program is structured as a matching program. Thus, unlike the general-purpose tax subsidies at issue in *Regan*, the direct federal grant funds are specifically intended to provide an impetus for matching funds to promote the purposes of Title X. By agreeing to dedicate matching funds and grant-related income to a Title X program, a recipient organization effectively consents to a voluntary tax for these purposes.

Second, whereas the baseline percentage of the federal subsidy in *Regan* was the individual's marginal tax rate, the direct federal subsidy of Title X programs is at least 90%. Thus, federal funds provide the essential funding for Title X programs, and the high rate of subsidy provides even greater justification than in *Regan* for characterizing remaining Title X funds as public.

Third, whereas in *Regan* the Court understood the organization's contributions to come from private taxpayers, Title X recipient organizations can and do use other government funds (and, when permitted, grant-related income) to meet their matching share. *See* 45 C.F.R. §§ 74.52(a), 74.53(a)(2) (permitting matching share to be met through non-federal grants, which may include federal general revenue sharing funds); *id.* § 74.53(a)(3). Such matching funds would not be "wholly private" even apart from their dedication to Title X. Similarly, grant-related income—which is income generated by the Title X program and which presumptively serves to offset the gross costs of the program, 45 C.F.R. § 74.42(c)(1)—is more clearly public than the individual contributions in *Regan*.

In sum, the fact that the direct federal grants of 90% of the costs of Title X programs are supplemented by

matching grants and grant-related income does not render the Title X regulations constitutionally suspect.

B. Section 59.9, Either Alone Or In Tandem With Section 59.8, Does Not Impermissibly Burden Recipient Organizations' Rights To Engage In Abortion Activities Outside A Title X Program; Rather, It Ensures That Title X Funds Do Not Improperly Subsidize Such Abortion Activities.

Petitioners argue that the "program integrity" requirement of Section 59.9 unconstitutionally burdens the abortion-related expressive activities of recipient organizations outside the Title X program. Rust Brief at 27-31; State Brief at 42-46.

Petitioners' argument has two basic prongs. First, they argue that under Section 59.9, they will not be able to use Title X funds to share the costs of facilities and personnel used in common with non-Title X programs and activities. Rust Brief at 27-30; State Brief at 42-45. Second, they argue that Section 59.9, combined with Section 59.8, will prevent recipient organizations from using the Title X program to refer Title X clients to the abortion services that these same organizations provide outside the Title X program. Rust Brief at 30-31; State Brief at 45-46. *In short, Petitioners' real complaint is that they will not be able to use Title X funds to cross-subsidize their non-Title X activities and to solicit clients for their non-Title X abortion services.*

Contrary to Petitioners' claim (Rust Brief at 28 & n. 49; State Brief at 44), this Court's opinion in *Regan* supports the appropriateness—indeed, the necessity—of preventing Title X funds from being used to cross-subsidize activities outside the scope of Title X. In *Regan*, the Court, in recognizing that an entity might employ a Section 501(c)(3) organization for nonlobbying activities and a Section 501(c)(4) organization for lobbying, warned that such an entity "would, of course, have to ensure that the § 501(c)(3) organization did not subsi-

dize the § 501(c)(4) organization; *otherwise, public funds might be spent on an activity Congress chose not to subsidize.*" 461 U.S. at 544 (emphasis added).

Absent the "physical separation" requirement of Section 59.9, Title X funds would be used to cross-subsidize non-Title X abortion services, and recipient organizations, including Petitioners, could subvert Title X by using Title X funds to solicit clients for abortions. Indeed, it was precisely such abuses that the Title X regulations were designed to end. 53 Fed. Reg. at 2924-25. Thus, it is clear that Petitioners have no right to "pool" Title X funds with other funds.[26]

In sum, Section 59.9, alone or in tandem with Section 59.8, does not infringe Petitioners' First Amendment rights. Instead, it operates to ensure that Title X funds not be used to promote an activity—abortion—that Congress chose not to subsidize through Title X.[27]

CONCLUSION

The Title X regulations do not infringe Petitioners' First Amendment rights. The American Academy of Medical Ethics therefore requests that the Court affirm the ruling of the United States Court of Appeals for the Second Circuit.

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[26] Each of the cases cited by Petitioners in support of a right to pool funds (*see* Rust Brief at 28, 29-30; State Brief at 44-45) involved pooling of private funds, not pooling of federal funds with private funds.

[27] Because Section 59.9 promotes the congressional purpose of ensuring that Title X funds are not used to subsidize abortion (or other non-Title X activities), Petitioners' strained reliance on *Regan* (Rust Brief at 28 & n. 49, State Brief at 44) is mistaken. *See Regan*, 461 U.S. at 544 n. 6 (separation requirement that is related to congressional purpose of ensuring that cross-subsidization does not occur is not unduly burdensome).

Respectfully submitted,

CAROLYN B. KUHL
M. EDWARD WHELAN III
MUNGER, TOLLES & OLSON
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, California 90071
(213) 683-9100
Counsel for Amicus Curiae
The American Academy
of Medical Ethics *

Dated: September 7, 1990

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* Counsel gratefully acknowledges the assistance of Michael J. Haungs (J.D., Columbia Law School, 1990) in the preparation of this Brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DR. IRVING RUST, *et al.*,
Petitioners,

v.

DR. LOUIS SULLIVAN,
Secretary of the Department of Health
and Human Services,
Respondent.

THE STATE OF NEW YORK, *et al.*,
Petitioners,

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and Human Services,
Respondent.

On Writs of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE UNITED STATES CATHOLIC CONFERENCE IN SUPPORT OF RESPONDENT

MARK E. CHOPKO *
General Counsel

PHILIP H. HARRIS
Solicitor

UNITED STATES CATHOLIC CONFERENCE
3211 4th Street, N.E.
Washington, D.C. 20017-1194
(202) 541-3300

Of Counsel:
HELEN M. ALVARÉ

September 7, 1990

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

Nos. 89-1391, 89-1392

DR. IRVING RUST, *et al.*,
Petitioners,
v.

DR. LOUIS SULLIVAN,
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and Human Services,
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THE STATE OF NEW YORK, *et al.*,
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DR. LOUIS SULLIVAN,
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On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF *AMICUS CURIAE* OF THE UNITED STATES CATHOLIC CONFERENCE IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS*

The United States Catholic Conference ("Conference") is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the active Catholic Bishops in the United States. The Conference advocates and promotes the pastoral teaching of

the Bishops in such diverse areas as education, family life, health and hospitals, social welfare, immigration, civil rights, criminal justice, and the economy. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people in the United States. This is especially so in cases affecting the most fundamental right—the right to life. The Conference filed written comments in support of the rules challenged in the instant case and appeared as *amicus curiae* before the Second Circuit in this case.

The Conference is concerned that reversal of the Second Circuit's judgment will hinder effective enforcement of Section 1008 of Title X of the Public Health Service Act, Pub. L. No. 91-572, 42 U.S.C. § 300, *et seq.* (1970), and undermine the federal government's policy disfavoring abortion. In 1970, Congress enacted Title X in order to deliver federally funded family planning services to low-income persons. Although Congress intended to deny Title X funds to programs where abortion was a method of family planning (42 U.S.C. § 300a-6 (Section 1008)), enforcement and implementation of this prohibition by the Department of Health and Human Services was informal and uneven. The Conference—as well as others—was openly critical of the Department's administration of Section 1008. In 1988, after much debate about the legitimacy of continuing Title X funding for programs which were also promoting abortion, the Department for the first time issued regulations enforcing and implementing Section 1008. The instant case challenges those important restrictions on the promotion of abortion in Title X projects, restrictions that are consistent with congressional intent, constitutional principle, and sound public policy. For that reason, the Conference supported the Secretary of the Department of Health and Human Services in the court below and continues to do so here.

The parties have consented to the appearance of the United States Catholic Conference as *amicus curiae*.

SUMMARY OF ARGUMENT

In 1970, in order to provide family planning assistance to low-income families, Congress enacted Title X of the Public Health Service Act. Pub. L. No. 91-572, 42 U.S.C. § 300, *et seq.* (1970). During the legislative debate leading to enactment of the statute, Congress carefully distinguished between methods which would prevent pregnancy and methods which would prevent birth by terminating pregnancy. Congress intended to fund a program aimed at providing contraceptive services but, at the same time, to ensure that Title X funds would not be used to promote or encourage abortion in any way. 42 U.S.C. § 300a-6 (Section 1008).

Until 1988, the Department of Health and Human Services (hereafter "HHS") issued no regulations specifically implementing Title X's abortion restriction. Prior to that time, the staff of the Public Health Service, through its grant application review guidelines, had effectively mandated the provision of abortion-related services in Title X programs. Thus, while Title X denies the use of federal funds in programs where abortion is a "method of family planning," Public Health Service staff had sidestepped this proscription by calling abortion referral a related "required service." *See* Bureau of Community Health Services, Department of Health and Human Services, Program Guidelines for Project Grants for Family Planning Services, Guideline 8.6 (1981) (hereafter "Guidelines").[1]

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[1] The Conference has always been concerned that the 1981 Guidelines were in tension with the policy of federal "conscience clauses." 42 U.S.C. § 300a-7(a), (c) (1982). The Public Health Service Guidelines, which envision a formal referral process designed to "assure" that abortion appointments are kept (*see, e.g.*, Guideline 7.4), clearly threaten to undermine federal policies designed to protect health care personnel from having to choose between institutional policy and their religious beliefs. For this reason, aside from their conflict with Section 1008, those 1981 Guidelines have long been considered illegitimate by the United

Through the use of these Guidelines, Title X grantees were openly arranging elective abortions for Title X clients in violation of Congress' clear proscription of such activity. It was no secret that organizations that performed, advocated, and encouraged abortion, such as petitioner Planned Parenthood, were major Title X grantees. As a result, the Public Health Service Guidelines became the target of much critical commentary; they were contrary to Title X and undermined broader federal policy encouraging childbirth over abortion—a policy embodied in, among other things, funding restrictions for abortion services. *See Harris v. McRae*, 448 U.S. 297 (1980). The eventual efforts by HHS to enforce Section 1008 of Title X were long overdue. No longer were Title X grantees able to create a mere "paper" separation between their operations providing family planning services and those providing abortion services. In many instances, some of which were described in the rulemaking record, Title X and abortion services had been openly offered together, sometimes in the same room within an organization. Thus grantees' clients were confused about the nature of Title X services, and the federal government's insistence that abortion was not to be promoted with federal money was made an apparent sham. Faced with these circumstances, HHS was within its regulatory discretion to implement Section 1008 by insisting on physical separation of abortion services and elimination of abortion advocacy from the Title X program.

The HHS regulations are entirely consistent with both the plain language of Title X and its legislative history. When Title X was enacted, abortion was a crime in virtually all states. The legislative history demonstrates that Congress intended for the Title X program to avoid

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States Catholic Conference. Because of their opposition to artificial contraception, Catholic organizations may not properly participate as grantees for the full scope of Title X services.

all involvement with abortion. In the 1988 rulemaking, HHS enacted its first binding interpretation enforcing that restriction, thereby correcting informal staff practice that was at best uneven and at worst contrary to law. This Court need only decide if the HHS regulations are reasonable and lawful—a standard these rules plainly satisfy.

Unlike programs in which constitutional rights are required to be surrendered as the price for receipt of some federal benefit, Title X rules demand only that prospective grantees be willing to abide by limitations designed to advance and protect the federal program. These rules place no new obstacles in the way of a pregnant woman's access to abortion. Indeed, as a pre-pregnancy program, Title X simply has no effect on a pregnant woman's relationship with her doctor. Forbearance from abortion advocacy and counseling is not the price of receiving a benefit but an essential component of the program. Private whim may not be allowed to convert a federal pre-pregnancy family planning program into a pre-natal (or more accurately, an "anti-natal") pregnancy services program. If grantees may resist programmatic restrictions with which they disagree, they would be able to change the character of this or any other program into something Congress never intended or even explicitly prohibited.

The lower courts in this case properly understood the discretionary nature of the statutory and regulatory power exercised by HHS. They also correctly understood the agency's right to implement Congress' decision to fund only programs where abortion is not a method of family planning. A review of the opinions below, as well as the rulemaking documents and records, will show that HHS faced and effectively responded to a serious challenge to the legitimacy of the only substantive proscription in Title X—that federal programs may not provide, encourage or counsel abortion. The Second Circuit's judgment must be affirmed.

ARGUMENT

The provision of family planning services in the United States, like so many other social services, reflects essentially a statutory combination of government and private resources. *See, e.g.*, Pub. L. No. 91-572, § 2 (1970) (Statement of Purposes for Title X). This form of public/nonpublic cooperation has effectively replaced the historically private social service system with a broader, government-supported umbrella of social services. Under such arrangements, government funds provide most of the financial support, with private entities supplementing the financial resources and supplying the direct delivery of services to the population. Such agreements, mandated by legislation, have both affirmative and restrictive aspects. Affirmatively, the government must depend on the goodwill of the private entity to assure that its policy goals are achieved. It also must demand enforcement of a program's restrictive requirements to ensure that public money is not misused by the grantees. The achievement of both statutory requirements is necessary for the proper delivery of social services under such programs.

In this case, private grantees challenge the restrictive requirements of a statute enacted by Congress and interpreted by the agency charged with enforcement. They seek to impose their own will on a federal social service program and transform the government's family planning policy from one encouraging pregnancy prevention to one fostering pregnancy termination. Their efforts must fail on both statutory and constitutional grounds.

I. THE REGULATIONS ISSUED BY THE DEPARTMENT OF HEALTH AND HUMAN SERVICES ACCORD WITH CONGRESSIONAL INTENT.

In 1970, Congress enacted a program to provide low-income individuals with family planning services, offering grants to public or nonprofit private entities to

execute the program according to its statutory terms—terms which included, among others, a prohibition against employing funds "in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6 (Section 1008). The statute also carried a mandate for "such regulations as the Secretary may promulgate." 42 U.S.C. § 300a-4(a) (1982). The Secretary of the Department of Health and Human Services (HHS) accordingly promulgated implementing regulations. Among those are 42 C.F.R. § 59.2 (1989) which defines "Title X project funds" as all funds allocated to a Title X program, including but not limited to grant funds, grant-related income and matching funds.[2] Sections 59.8, 59.9, and 59.10 prohibit grantees from employing Title X project funds for counseling or referral for abortion services or for abortion advocacy efforts; they require the separation of facilities, personnel and records to enforce these prohibitions. Also, amended 42 C.F.R. § 59.7 (1989) requires grantees to provide "assurance satisfactory to the Secretary that [the program] does not include abortion as a method of family planning." *See* 53 Fed. Reg. 2944 (Feb. 2, 1988).

Not merely a prohibition on the use of Title X funds for the actual performance of abortions, Section 1008 broadly precludes the extension of any federal financial assistance to programs that promote or encourage abortion "in any way."[3] Petitioners see in Section 1008's language a ban only on actually providing abortions within a Title X program, not on speech about abortion.[4] But their reasoning is flawed. In every case, and in its every phase, the family planning process involves speech about family planning options. Information is an

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[2] Ordinarily, Title X grants constitute 90% or more of the total funding for a Title X program. 42 U.S.C. § 300a-4(a).

[3] 116 *Cong. Rec.* 37375 (1970) (Congressman Dingell).

[4] Petitioners' Brief at 41-42 (hereafter "Pet. Brief").

essential service in every family planning program. Abortion, advocated or referred for, is just as much a part of a Title X program as if it were provided. The result is the same: abortion becomes a method of family planning.

Further supporting this conclusion is the fact that certain family planning options remain part of a family planning program even when the grantee does not have the facilities to provide them but only refers clients to another facility. *See* Bureau of Community Health Services, Department of Health and Human Services, Program Guidelines for Project Grants for Family Planning Services (1981) (hereafter "Guidelines") 6.1 ("Structure of the Grantee") and 7.4 ("Referrals and Follow-up"); 42 C.F.R. § 59.5(b)(1) (1989) ("Each Title X project must: Provide for . . . necessary referrals to other medical facilities when medically indicated . . . ."). Oral referrals regarding an option make that option a part of the Title X project. Implementation of Section 1008 therefore requires that Title X programs neither provide nor refer for abortion.[5]

In enforcing the congressional mandate with the cited regulations, HHS drew a bright line between provision of preventive family planing services to those not yet pregnant and provision of services to pregnant women. Although this would appear to be a reasonable, even required, interpretation of Title X by the agency charged with enforcement, petitioners disagree with the location

[5] It is clear also from Section 1001 of Title X (42 U.S.C. § 300(a) (1982)) that the language of Section 1008 contemplates a ban on more than abortion procedures. Section 300(a) requires grantees to "offer" family planning methods and services, and lists specific types. But Section 1008 does not prohibit merely "offering" abortion. It bans, more broadly, "abortion . . . [as] a method of family planning."

of the line HHS has drawn and with the selection of measures to enforce it. It remains, nevertheless, the prerogative of HHS—not petitioners or a court—to choose specific methods for implementing Congress' intent to limit Title X funds to projects providing only pre-pregnancy services. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213 (1976); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

A. Congress Intended to Fund Only Pre-pregnancy Services, Not to Allow Grantees to Encourage or Promote Abortion in Title X Programs.

Although some terms in Section 1008 may admit of more than one construction, this much is certain: Section 1008 precludes the facilitation and promotion of abortion in Title X programs.[6] How HHS was to administer this prohibition is not prescribed. Title X would appear to permit HHS a range of permissible options to bar federal funds from programs using abortion as a method of family planning. It is axiomatic that an agency's choice among alternative regulations for implementing a statute is a decision reserved exclusively to that agency and will not be overruled if it is reasonable in light of all the circumstances. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984). Thus the district court correctly determined that the "new regulations do not offend the direction contained in section 1008 . . . ." *New York v. Bowen*, 690 F. Supp. 1261, 1272 (S.D.N.Y. 1988). The Second Circuit properly upheld that determination. *New York v. Sullivan*, 889 F.2d 401 (1989), *cert. granted*, 110 S. Ct. 2559 (May 29, 1990). The First Circuit, *en banc*, reached a similar conclusion. *Massachusetts v. Sullivan*, 899 F.2d 53, 64 (1st Cir. 1990).

[6] *See* note 3, *supra*.

That direction was spelled out explicitly by Representative Dingell, a principal sponsor of a Section 1008 amendment, in his floor statement:

> With the "prohibition of abortion" amendment—Title X, Section 1008—the committee members clearly intend that *abortion is not to be encouraged or promoted in any way through this legislation* . . . .
>
> There is a fundamental difference between the prevention of conception and the destruction of developing human life. Responsible parenthood requires different attitudes toward human life once conceived than toward the employment of preventive contraceptive devices or methods. What is unplanned contraceptively does not necessarily become unwanted humanly . . . .

116 *Cong. Rec.* 37375 (1970) (emphasis added). Continuing, Representative Dingell observed that:

> If there is a direct relationship between family planning and abortion, it would be this, that properly operated family planning programs should reduce the incidence of abortion.

Id. He also cited "evidence that abortion as a method of family planning has a negative effect on the implementation of family planning programs," and that "the prevalence of abortion as a substitute or a back-up for contraceptive methods can reduce the effectiveness of family planning programs." *Id.*[7] HHS properly concluded from

[7] As early as 1970, the possibility that abortion availability could undermine the prevention of pregnancies had already been explored in D. Callahan, *Abortion: Law, Choice and Morality*, Chapter 7 (1970). More recent analyses include: K. Luker, *Taking Chances: Abortion and the Decision Not to Contracept*, 10 and n.e (1975) ("California women seem to bemaking a *de facto* choice of abortion as a method of fertility control." The legalization of abortion has apparently led to a "reduced motivation to use contraceptives."); R. Sherlock, "The Demographic Argument for Liberal Abortion Policies: Analysis of a Pseudo-Issue," in *New*

its review of legislative history that "Title X is meant to fund the provision of preventive and other pre-pregnancy family planning services, and not to promote or encourage abortion in any way." 52 Fed. Reg. 33,210 (Sept. 1, 1987). Petitioners' attempt to import abortion into Title X as a backup to contraception [8] must fail in light of this legislative history, especially Representative Dingell's clear statement to the contrary.[9]

Other legislative activity also supports the choices HHS made in its effort to effectuate the congressional mandate embodied in Section 1008. For example, in 1978, during debates concerning possible amendments to Title X, Representative Dornan proposed to amend Section 1006 of Title X to strengthen the antiabortion restriction, as follows:

> No grant or contract authorized by this title may be made or entered into with an entity which directly or indirectly provides abortion, abortion counseling, or any abortion referral services.

124 *Cong. Rec.* H13289 (daily ed. Oct. 13, 1978). The proposed amendment was refused on the grounds that Section 1008 of the Act already encompassed the proffered prohibitions. Representative Rogers, a member of the Public Health & Welfare Subcommittee at the time Title X was enacted, stated:

Perspectives on Human Abortion (Hilgers, Horan and Mall eds. 1981) 450-65, especially 456-60; and Kasun, "Cutoff of Abortion Funds Doesn't Deliver Welfare Babies," *The Wall Street Journal*, Dec. 30, 1986 (suggesting that a cutoff of public funding for abortion in Ohio and Georgia led more people to "take steps to reduce conception").

[8] Pet. Brief at 41 n.74 ("Title X programs, . . . treat abortion as a backup to contraceptive or human failure . . .").

[9] Petitioners acknowledge that a statute's contemporaneous legislative history constitutes "the most reliable indicator of congressional intent . . . ." Pet. Brief at 42 n.77.

> Abortion is not a method of family planning. *Abortion comes after pregnancy—after pregnancy. And the gentleman misses the point of what we are doing in Title X. It's before—before. It is to let people know how to avoid pregnancy.* We cannot use any funds for abortion. The amendment is not needed.

Id. (emphasis added).

Further support for the conclusion that HHS correctly interpreted the legislative history applicable to Title X is found in the state of the law concerning abortion at the time Congress enacted Title X.[10] In 1970, abortion was illegal in most states and the District of Columbia. *Roe v. Wade*, 410 U.S. 113, 118 n.2 (1973).[11] Therefore, if Congress intended to permit Title X projects to advocate, counsel or refer for abortions, it would have been encouraging and even funding activity that was criminal in a majority of states. More importantly, Title X was not drafted anticipating a change in the legal status of abortion in 1973, nor was it ever amended to do so. If it is the overwhelming consensus of the existing laws that

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[10] According to settled principles of statutory construction, it is appropriate to consider the state of the law contemporaneous with the legislation at issue to discern Congress' true legislative intent respecting the statute. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."); *Director, OWCP v. Perini North River Assocs.*, 459 U.S. 318, 319 (1983) ("We may presume 'that our elected representatives, like other citizens, know the law,'" (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979))).

[11] Petitioners' suggestion that, in 1970, the "vast majority of states permitted abortions under varying circumstances" (Pet. Brief at 43 n.78) is a misleading characterization of the true state of the law in 1970. This Court recognized in *Roe* that for a long period of time prior to 1973, a majority of states criminalized abortion in *all* cases *save* when a mother's life was at stake. 410 U.S. at 118 n.2.

certain conduct is forbidden, even criminal, this is indeed weighty evidence that a legislature did not intend to permit, finance or encourage it in any way.

The fact that abortion was generally illegal in 1970 is of additional importance because, in 1987, Representative Dingell criticized the proposed HHS regulations as inappropriate to the *current* legal environment. He even attempted to recant his various floor statements which were part of the 1970 legislative history.[12] But his *post facto* attempt to revisit and revise the legislative history has no legal or interpretative effect. The HHS regulations are valid whether or not his 1970 remarks specifically suggested or intended the precise requirements eventually imposed by HHS. HHS—as well as this Court—must consider the state of the law concerning abortion at the time Title X was enacted to discern true congressional intent, despite changes in the law since 1970. This is not a principle of limitation but a canon of construction;[13] it mandates that because legal liability would have attended *"any part of the [abortion] referral process,"*[14] HHS must understand Congress to have intended that Title X programs be completely separate from that process.

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[12] First he argued that his remarks did not "suggest" endorsement of any specific requirements to be imposed by regulations. Then he stated that the full content of remarks in the Conference Report evidenced a congressional intent not to interfere with the activities of "organizations" supported by non-Title X funds. Third, he suggested that HHS should have "viewed in a different light" the legal concerns giving rise to his 1970 comments. By specific referral to *Roe v. Wade*, he also noted that his statements were delivered during a period when "legal liability could . . . have attended any part of the referral process" and that HHS is "required," under principles of statutory construction, to make "reference to the state of the law at the time legislation [was] passed." Letter from John D. Dingell to Otis R. Bowen (Oct. 14, 1987).

[13] *See* note 10, *supra*.

[14] *See* letter from John Dingell, note 12, *supra* (emphasis added).

B. The Court of Appeals Correctly Concluded that the Regulations, the First Authoritative Interpretation of Section 1008, Are Reasonable and Lawful.

It is no secret that many Title X grantees are among the leading abortion services providers in the United States. It is plain where the sympathies of these grantees lie in the public controversy over abortion. It is also plain that such grantees operated programs where the separation between Title X and abortion services was only as strong as their commitment to furnish forms and other paperwork showing that no federal, as opposed to non-federal, Title X money was spent on abortion. The record compiled in the rulemaking proceeding suggests that the client population was sometimes misled and often confused by such activities.[15] In order to correct such misinterpretations and end any confusion, binding regulatory action was needed to separate Title X programs from abortion and, thus, enforce the statute. 53 Fed. Reg. 2923 (Jan. 28, 1988). In order to so act, the Secretary of HHS had to address himself to prior practise by his own agency.

As the Second Circuit observed: "The fact that an agency is departing from a long-held prior interpretation is of course an item to be taken into account by a court reviewing agency action." *Sullivan*, 889 F.2d at 409. The only evidence of "prior interpretation," in this

[15] The rulemaking docket contains evidence that numerous clients of Planned Parenthood facilities (one of the largest recipients of Title X funding) were actively advised to seek abortions, in contravention of Title X (and even the 1981 Guidelines permitting, at most, abortion *referrals*). At least 33 letters commenting upon the proposed regulations spoke to these abuses. *See* affidavits of various Planned Parenthood officials acknowledging that abortion is regularly counseled as a "backup" contraceptive method at their facilities. *Planned Parenthood Federation of America v. Bowen*, Civ. Action No. 88 W 158 (D. Colo. 1988) (affidavits of Karril Galloway, Kirtly Jones, Marilyn Foelski and Sylvia Clark).

case, however, are internal HHS memoranda and letters, and the 1981 staff Guidelines.[16] *See generally*, *Bowen*, 690 F. Supp. at 1269-71. Such documents do not have the same official status as regulations or administrative decisions binding on both the agency and the public, and are not entitled to the same deference by agencies, or by courts reviewing new rulemaking on the same subject. *Davis v. United States*, 110 S. Ct. 2014, 2022 (1990).[17] In *Motor Vehicle Manufacturers' Ass'n v. State Farm Mutual Auto Ins. Co.*, and *NLRB v. Bell Aerospace Co.*,[18] two cases relied upon by petitioners, federal executive entities allegedly departed from precedent established in hearings before their administrative boards. Until overruled or modified, such precedent indeed binds agencies to act in a particular way. But the instant case involves only interpretive guidelines,[19] memoranda and opinion letters—a significant difference.

Traditionally, "interpretive guidelines" are not binding except on the staff and are not entitled to the defer-

[16] Regulations implementing but not interpreting Section 1008 were issued in 1971 (36 Fed. Reg. 18,465, Sept. 15, 1971) and revised in 1980 (45 Fed. Reg. 37,436, June 3, 1980). Both merely stated that Title X projects could not "provide abortions as a method of family planning."

[17] As the court of appeals also correctly observed (*Sullivan*, 889 F.2d at 409), an agency may change its mind, especially when faced with circumstances demanding regulatory attention. *American Trucking Ass'ns v. Atchison, Topeka & S.F. Ry. Co.*, 387 U.S. 397, 416 (1967). Such reconsideration by an agency is entitled to judicial deference. *Motor Vehicle Manufacturers' Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 42 (1983).

[18] Respectively, 463 U.S. 29 (1983) and 416 U.S. 267 (1974).

[19] The Guidelines state that their purpose is merely to "*interpret*[] *the law and regulations.*" Guidelines 2.0 (emphasis added). Additionally, a United States Court of Appeals specifically judged these Guidelines to be "interpretive" only. *Valley Family Planning v. North Dakota*, 661 F.2d 99 (8th Cir. 1981).

ential judicial review accorded regulations. *Davis v. United States, supra. See also Morton v. Ruiz*, 415 U.S. 199 (1974); *Joseph v. United States Civil Service Commission*, 554 F.2d 1140, 1154 n.26 (D.C. Cir. 1977) ("Interpretative rules do not have the force of law and even though courts often defer to an agency's interpretative rule they are always free to choose otherwise.") Internal memoranda bear even less official weight since they are not intended for public scrutiny. *See Morton v. Ruiz, supra.* At most, the evidence in this case suggests that a course of action was followed by HHS administrators because the internal memoranda involved are from legal counsel.[20] It would have been equally warranted for administrators to have departed from that advice, especially to the extent internal documents were inconsistent with the statute. *Morton v. Ruiz*, 415 U.S. at 237 ("In order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose").[21]

[20] In seeking to maintain the importance of a 1971 internal memorandum authored by HHS attorney Joel Mangel, due to its contemporaneity with Title X's passage, petitioners cite four cases. Not one involves contemporaneous interpretation similar to this memorandum. *NLRB v. United Food & Commercial Workers*, 484 U.S. 112, 124 n.20 (1987) (contemporaneous regulations); *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981) (contemporaneous regulations); *Bankamerica Corp. v. United States*, 462 U.S. 122, 130 (1983) (policy of not enforcing against certain defendants since statute's inception). In the fourth case, this Court affirmatively asserted the superiority of regulations to "interpretive rulings." *Davis v. United States*, 110 S. Ct. at 2022.

[21] Besides contradicting Title X, the Guidelines also contradict the broader federal policy favoring childbirth over abortion by encouraging abortion activities in programs receiving federal financial assistance (*see Harris v. McRae*, 448 U.S. 297 (1980)). One should extend a broad reading to the abortion restriction in order to protect the federal policy disfavoring abortion. *See Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3052 (1989) ("[T]he State need not commit any resources to facilitating abortions, even if it can turn a profit by doing so.") (emphasis added).

In any event, as both lower courts in this case recognized, the HHS Secretary was not bound to follow such advice. *Sullivan*, 889 F.2d at 409; *Bowen*, 690 F. Supp. at 1270-72.

As the first binding interpretation of Section 1008 issued under HHS rulemaking powers, the challenged regulations are judged only by the ordinary standards applicable to notice and comment rulemaking. So long as these rules are reasonable and lawful, they survive judicial review. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. at 415, 416. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). Reasonableness is a minimal standard: if any set of facts appears in the record to support the rules, the agency must prevail.[22] The Court "need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11; *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Lawfulness is measured by compliance with relevant statutory and constitutional restrictions. When regulations, whether initial or revised, are "fully consistent" with "the language and history" of the statute, as the HHS regulations are in this case, they "must be upheld" by a reviewing court. *Sullivan*, 889 F.2d at 409. That considered judgment by the Second Circuit reflects proper application of Supreme Court precedent to the particular facts of this case.

The staff Guidelines called referral for elective abortion a related "required service" and not a "method of family planning." Guidelines 8.6, *supra*. By so designating it, the staff effectively avoided Section 1008's proscription by simply defining away the restriction. The

[22] A sufficient basis for the rules is set forth in the rulemaking documents and comments and will not be restated here. *See* 53 Fed. Reg. 2944 (Feb. 2, 1988).

Guidelines, which bound only HHS staff in charge of reviewing grant applications and grantee performance, effectively "required" as a condition of funding that grantees refer for abortion as an "other required service" whenever requested or whenever grantee personnel were inclined to do so. The Department, as distinguished from the staff, never issued binding and clear regulations on the Title X abortion restriction until 1988. For the reasons stated above, the 1988 rules separating Title X from abortion services, and prohibiting counseling and abortion advocacy, survive proper statutory analysis. Indeed, those regulations were the first correct interpretation of Section 1008 ever offered by HHS or its staff. They are easily within the discretion of the agency responsible for promulgating regulations implementing Section 1008.

II. THE TITLE X REGULATIONS DO NOT INFRINGE CONSTITUTIONAL RIGHTS.

Petitioners complain that the Title X regulations confront those clinics receiving non-Title X funds for abortion counseling, referral, or advocacy with two untenable alternatives: compliance with an unduly burdensome separation requirement or loss of Title X funding. They complain that each of these alternatives infringes their exercise of constitutional rights. In effect, petitioners insist on the ability to spend Title X program-related funds in any manner. To sustain their argument, they distort the realities of government grant funding by attempting to distinguish among the sources of funds for the Title X program as the basis for their complaint, and they demand constitutional relief where none is warranted.

A. Freedom of Speech is Not Abridged by the Title X Regulations.

Within the limits of its constitutional authority, Congress has broad discretion to formulate social services programs. It is the considered judgment of the Congress,

implemented by the Executive Branch, that childbirth is preferred over abortion. This policy is reflected in funding restrictions generally (*Harris v. McRae*) and in federal family planning programs. Both federal family planning programs, Title X, the statute at issue here, and Title XX, the Adolescent Family Life Act (hereafter "AFLA"),[23] fund family planning and pregnancy services *without* an abortion component. Petitioners claim that exclusion of abortion services from Title X programs constitutes an unconstitutional penalty. But it is Congress, and not petitioners, that establishes the parameters of such government programs. As this Court observed in *Maher v. Roe*, 432 U.S. 464, 475 (1977):

> There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.

See also Webster v. Reproductive Health Services, 109 S. Ct. 3040, 3052 (1989). Because the expenditure of federal funds and conduct of federal programs may be limited by congressional policies favoring childbirth over abortion, the lower courts properly affirmed the Title X regulations against constitutional challenge. The district court correctly concluded, and the court of appeals agreed, that no grantee would be improperly deprived of any "rights" to speak about abortion. *Sullivan*, 889 F.2d at 412. "The regulations do not prohibit or compel speech. They grant money to support one view and not another, but that is quite different from infringing on free speech." *Bowen*, 690 F. Supp. at 1274.

Federal benefit programs are in the nature of "contracts." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).[24] On one side of any po-

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[23] 42 U.S.C. §§ 300z, 300z-5(a)(21) (1982).

[24] As the Supreme Court stated in *Pennhurst*, 451 U.S. at 17: "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States

tential Title X "contract" is the government, extending an offer containing the above-described terms. On the other side is the potential grantee who can accept or reject the extended offer according to its terms. Of course, part of the decision to accept involves a separate determination by the grantee whether to raise and commit non-federal funds to the purposes of the project, *e.g.*, family planning services along the lines of the program.[25] Only when a grantee chooses to commit its funds (approximately 10% of the program's costs, but sometimes more)[26] will the grant restrictions be both accepted and enforceable. Once committed, those funds are as much "Title X project funds" as the grant itself. 42 C.F.R. § 59.2 (1989). This result is consistent with this Court's earlier holding in *Grove City College v. Bell*, 465 U.S. 555, 571 (1984) (interpreting "program or activity"), that conditions applicable to federally funded programs also restrict privately funded activities within the program. 465 U.S. at 571 n.21.

It follows then that any so-called "private" funds a Title X project possesses derive logically from the Title X grant. HHS is not denying a government benefit to grantees because of their exercise of protected speech with private funds. By enforcing the statute, HHS denies them unrestricted use of funds generated to support a federal program. *See Bowen*, 690 F. Supp. at 1273,

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agree to comply with federally imposed conditions." *See also Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).

[25] Petitioners unsuccessfully attempt to diminish the significance of federal grant funds in Title X programs by citing statistics showing that such funds do not constitute the largest percentage of certain agencies' total "family planning programs" or total sources of support. See Pet. Brief at 25-26 n.43, 26 n.44, 3 n.5. But petitioners' figures do not represent how significant a percentage of the *Title X programs* government funds represent—commonly 90% or more of the funds of each Title X program.

[26] *See* 42 U.S.C. § 300a-4(a) (Section 1006).

1274. To allow non-federal funds, generated to enable participation or acceptance of the grant, to dictate the conduct of the federal project, eviscerates the federal intent and subverts the federal purpose.

Potential Title X grantees cannot unilaterally "reformulate" the terms of the government's offer, and proceed to accept it as reformulated. A grantee cannot decide that it will sponsor a program offering abortion as a method of family planning *and* that the government *will* contribute public funds to that program. This is analogous to holding that grantees of a federal program established to combat drug use could use their 10% non-federal funds to advocate decriminalization of illegal substances. *See Regan v. Taxation With Representation*, 461 U.S. 540, 546 (1983). This approach to federal grants was soundly rejected by this Court in *Grove City College v. Bell, supra*. There the College and some of its students claimed that Congress could not condition the receipt of federal financial aid upon forbearance from certain First Amendment associational rights. This Court framed the issue in contract language and summarily resolved it:

> Grove City's final challenge to the Court of Appeals' decision—that conditioning federal assistance on compliance with Title IX infringes First Amendment rights of the College and its students—warrants only brief consideration. Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept [citing *Pennhurst v. Halderman, supra*]. Grove City may terminate its participation in the BEOG [federal educational assistance] program and thus avoid the requirements of § 901(a) [the antidiscrimination provision]. Students affected by the Department's action may either take their BEOG's elsewhere or attend Grove City without federal financial assistance.

Id. at 575-76. Similarly, forbearance from abortion advocacy, counseling and referral, in the context of a Title

X project, is not a price paid for receiving a benefit but an essential feature of the federal government's family planning programs. To claim otherwise implies that proposed recipients of federal grants could demand their receipt on terms unilaterally fashioned by the grantees.[27]

Petitioners would force the federal government to grant them Title X funds for use in programs contravening the *only specific prohibition set forth by Congress* —that abortion not be employed as a method of family planning. Petitioners claim that the government is presuming to regulate the content of speech by insisting upon the non-performance of certain abortion-related activities with private funds. But, like the federal financial assistance at issue in *Grove City*, Title X funds are not monies which grantees are "obligated to accept."

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[27] In *Bowen v. Kendrick*, 487 U.S. 589 (1988), now on remand to the U.S. District Court, a group of plaintiffs attacked the constitutionality of the AFLA. Counsel for the plaintiffs in *Kendrick* are provided by the same American Civil Liberties Union Foundation Project that represents petitioners in this case. Plaintiffs in *Kendrick* complained that the statute (as opposed to the grants themselves) *fails* to restrict grantees from providing information about religion to clients in their AFLA programs. 487 U.S. at 597. Plaintiffs there would apply a broad restriction to all program funds, regardless of the source, and to all activities, even those outside the AFLA program. *See* Appellees' and Cross-Appellants' Brief in the United States Supreme Court, Nos. 87-253, 87-431, 87-462 & 87-775, at 37-41. Plaintiffs in *Kendrick* claim the Establishment Clause of the First Amendment as the basis for their insistence on prohibiting religious speech in AFLA programs, but their definition of religious speech includes speech concerning abortion and, necessarily, contraception. *Id.* at 48-49, 56-57. To adopt petitioners' line of argument in this case would allow the AFLA grantees in *Kendrick* simply to ignore any program content restrictions and insist that they have free speech *and* free exercise rights to use private funds to teach "religious dogma" in connection with their AFLA programs. Such use of conflicting first amendment interpretations in order to advance a pro-abortion agenda trivializes the constitutional freedoms of speech and religion.

465 U.S. at 575. Thus, grantees are not presented with a dilemma involving choices of a constitutional dimension. They are given the opportunity to participate in a program advancing certain goals and not others.

Allowing the "private," unlimited abortion advocacy or referral petitioners seek would distort the essential message of the government's family planning policy.[28] It would threaten the government's credibility and related interests and hinder the effectiveness of the family planning program. In other words, because a Title X program is part of the government's overall family planning policy, any abortion facilitation or advocacy in the context of a Title X program would necessarily reflect upon the government's policies and weaken the overall family planning program. Indeed, as recited in the 1970 legislative debate and confirmed afterward in studies,[29] facilitating access to abortion as a "backup" birth control method undermines the effectiveness of pregnancy prevention efforts. The government's legitimate interest in the enforceability and credibility of its own programs is evident. The objective of the regulations is not to suppress abortion-related speech but to protect public programs from private corruption. Such regulations do not infringe First Amendment rights.

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[28] Again, an analogy from the *Kendrick* case is instructive. If Title X grantees are constitutionally entitled to violate grant restrictions by injecting some of their own monies into the provision of services, then AFLA grantees must have the same, if not greater, constitutional right to discuss religious issues during client sessions not paid for with grant moneys, to use private funds to publish religious materials for their clients, and to refer AFLA clients to clergy outside the program for spiritual counseling. No one in that case is yet contending for such extraordinary privileges, but if petitioners are successful with such arguments here, there is no reason similar arguments should not be proffered, and prevail, in *Kendrick*.

[29] *See* note 7 and accompanying text, *supra*.

B. A Pregnant Woman's Relationship With Her Physician is Not Burdened by the Regulations.

Title X concerns only family planning, which involves pre-pregnancy services. By definition, abortion does not facilitate or prevent pregnancy; it is a procedure employed when preventive measures have not been used or have failed. Abortion is therefore beyond the scope of Title X. HHS recognized this simple fact in the Background section of its introduction to the proposed rules when it cited relevant legislative history in support of its rulemaking. 52 Fed. Reg. 33210-11 (Sept. 1, 1987). For example, the Conference Committee reported in connection with enactment of Title X:

> [I]t is, and has been the intent of both Houses that funds authorized under this legislation be used only to support preventive family planning services, infertility services, and other related medical, informational, and educational activities. The conferees have adopted the language contained in section 1008, which prohibits the use of such funds for abortion, *in order to make clear this intent.*

Conf. Rep. No. 91-1667, 91st Cong., 2d Sess. 8-9 (1970) (emphasis added). This Court may decide, for this reason alone, that petitioners' argument that these regulations interfere with a pregnant woman's right to consult with her physician concerning whether to choose childbirth or abortion, falls far wide of the mark.[30] But

[30] If Title X were a federal program designed to provide prenatal care to pregnant women, petitioners might have some opening at least for making their privacy argument, though it would fail. That it would fail is indicated by this Court's decision in *Webster*. 109 S. Ct. at 3050-53. The statutes at issue there clearly were aimed at abortion and other pregnancy-related services, but plaintiffs' attempts to overcome those statutory restrictions on providing abortion services were rejected, as were similar arguments in *Harris v. McRae* and *Poelker v. Doe*, 432 U.S. 519, 521 (1977). In the case at hand, petitioners' arguments are similarly deficient, as

where Congress has explicitly limited a grant program to pre-pregnancy services, and has excluded abortion specifically to emphasize that intent, arguments concerning what might be constitutionally mandated in a program directed at pregnant women are completely irrelevant.[31]

Petitioners rely heavily on this Court's decisions in *Akron v. Akron Center for Reproductive Health* and *Thornburgh v. American College of Obstetricians & Gynecologists*[32] for their primary argument that the HHS regulations interfere with a woman's right to choose abortion. *See also Sullivan*, 889 F.2d at 417 (Kearse, J., dissenting). Both cases, however, addressed statutory schemes that came into effect only when a woman was pregnant and seeking abortion; they were not pre-pregnancy services programs. In addition, those cases must be read in light of *Webster*'s recognition of a diminished constitutional status for the abortion decision and the enhanced strength of society's interests in regulating abortion *throughout* pregnancy. 109 S. Ct. at 3057-58.

In *Webster*, the majority opinion in *Thornburgh* came under severe criticism, especially to the extent it relied

both lower courts determined (*Sullivan*, 889 F.2d at 411-13; *Bowen*, 690 F. Supp. at 1272-74), and they are wholly inappropriate in a pre-pregnancy program.

[31] For this reason, the majority of the court of appeals should have explicitly disavowed, not acquiesced in, Judge Kearse's assertion in dissent that the regulations may impede a pregnant woman's exercise of her right of privacy. *See Sullivan*, 889 F.2d at 411. Even if such a right properly extended to abortion, it is not implicated by a federal program that has no pregnancy, let alone abortion, component. It is more than questionable whether privacy rights stretch so far. *See* Brief of the United States Catholic Conference, *Amicus Curiae* in *Webster v. Reproductive Health Services*, United States Supreme Court No. 88-605; Chopko, *Webster v. Reproductive Health Services: A Path to Constitutional Equilibrium*, 12 Campbell L. Rev. 181 (1990).

[32] Respectively, 462 U.S. 416 (1983) and 476 U.S. 747 (1986).

on the trimester approach from *Roe v. Wade* to invalidate restrictions on abortion availability. *See* 109 S. Ct. at 3057-58 (Rehnquist, C.J., with White and Kennedy, J.J.), 3063 (O'Connor, J., concurring), 3064 (Scalia, J., concurring). With regard to *Akron*, the plurality announced:

> There is no doubt that our holding today will allow some governmental regulation of abortion that would have been prohibited under the language of cases such as . . . *Akron v. Akron Center for Reproductive Health, Inc., supra.*

Id. at 3058; *see also id.* at 3063 (O'Connor, J., concurring), 3064 (Scalia, J., concurring). Therefore, even when reviewing governmental regulation of abortion, versus pregnancy prevention, uncritical reliance on those two opinions is unavailing.

Moreover, the specific regulations at issue here would be permitted even if *Thornburgh* and *Akron* stood unscathed. A majority in *Webster* stated: "*Maher*, *Poelker*, and *McRae* all support the view that the State need not commit *any resources to facilitating* abortions, even if it can turn a profit by doing so." 109 S. Ct. at 3052 (emphasis added). With that sentence, this Court preempted petitioners' argument in this case that Title X grantees must be permitted to facilitate abortions for clients who seek them within Title X programs, as well as the argument that matching funds can be applied to any purpose, even purposes Congress expressly prohibited. A grantee's funding contribution is indisputably a *resource committed* to the program. As such, its use is subject to Title X, and no constitutional right is implicated by requirements that it be expended solely in furtherance of family planning activities and not to facilitate abortion.

Finally, no new obstacles to obtaining an abortion are created by the Title X regulations. *See Harris v. McRae*, 448 U.S. at 315. This is underscored by the fact that the

intended beneficiaries of Title X are not required to perform or refrain from any activity. *Webster*, 109 S. Ct. at 3052. It is merely the grantee that is required to refrain from abortion-related activity in the Title X program. Their clients retain the choices they had prior to the institution of the regulations at issue. Just as the students in Grove City College had no right to have the government finance their choice of a particular school, Title X clients cannot claim a constitutional right to have facilitation of their abortion decision subsidized by government funds. *Grove City*, 465 U.S. at 576; *see also Taxation With Representation*, 461 U.S. at 549. As this Court announced in *Maher*, 432 U.S. at 474, and reiterated in *Webster*, 109 S. Ct. at 3052: "[T]he State may 'make a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds . . . .'" The long overdue implementation of Section 1008 of Title X by HHS represents just such a judgment.

CONCLUSION

For the above reasons, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

MARK E. CHOPKO *
General Counsel

PHILLIP H. HARRIS
Solicitor

UNITED STATES CATHOLIC CONFERENCE
3211 4th Street, N.E.
Washington, D.C. 20017-1194
(202) 541-3300

Of Counsel:
HELEN M. ALVARÉ

September 7, 1990

* Counsel of Record

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1391

IRVING RUST, M.D. *et al.*,
Petitioners,

v.

LOUIS W. SULLIVAN,
Secretary of Health and Human Services,
Respondent.

No. 89-1392

THE STATE OF NEW YORK, *et al.*,
Petitioners,

v.

LOUIS W. SULLIVAN,
Secretary of Health and Human Services,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*[1]

The Association of American Physicians and Surgeons, Inc. (AAPS), a not-for-profit corporation, is the largest association of private practicing physicians in the United

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[1] This brief is filed with the written consent of the parties. Letters of consent have been filed with the Clerk of this Court.

States. AAPS is comprised of active, practicing physicians and osteopaths of all specialties, from every state and territory in the United States and the District of Columbia. One purpose of the AAPS is to protect and preserve the integrity of the private practice of medicine and the ethical standards which define the profession. For these reasons, the issues involved in this case are of acute interest to the Association.

SUMMARY OF ARGUMENT

The regulations promulgated by the Secretary under Title X promote the highest standards of medical ethics and medical practice by fostering the health of both the mother and her unborn child. Since neither elective abortion nor prenatal care can be provided in the Title X program, a woman diagnosed as pregnant must be referred beyond the Title X facility for any further treatment of that pregnancy. In referring pregnant women for prenatal care, these regulations are well within the Government's prerogative to advance this traditional medical ethic in public health care services through the allocation of its resources. *Harris v. McRae*, 448 U.S. 297 (1980).

Prenatal care is a preeminent need for *every* mother and unborn child. These regulations provide for referral care for all women, including the 95% of abortion cases in which the mother's health is in no way implicated. For the five percent of pregnancies in which abortion may be related to the mother's health, these regulations promote considered consultation with a physician who can assess the risks to mother and child and advise appropriate care. The regulations comport with medical ethics by permitting a physician in a Title X project to refer for further medical services any patient who might need services not subsidized under Title X and by providing for the emergency medical needs of patients as these might arise.

The regulations are completely consistent with the doctrine of informed consent. Indeed, they enhance informed consent by requiring the physician to inform the patient upfront of the limits of the subsidized services. Generally, a physician has no ethical or legal obligation to counsel and refer for an elective procedure which he neither provides nor holds himself out to the community as providing. It is the physician proposing the treatment who must obtain informed consent. More specifically, physicians have no ethical obligation to counsel or refer for elective abortion.

Ultimately, the controversy surrounding these regulations, and the need for this Court to review them, is a direct result of *Roe v. Wade*, 410 U.S. 113 (1973). Though couched in terms of "good medicine," Petitioners' challenge necessarily relies on an absolute, autonomous right to elective abortion belonging to the physician and pregnant woman. This is an abortion case, not a First Amendment case. To the extent that Petitioners' claim is that the regulations impose a "content-based" discrimination under the First Amendment, the "content" is nothing more than encouraging elective abortion. This claim requires an expansion of *Roe v. Wade* in two discrete ways. First, Petitioners contend that they have a constitutional right to give abortion information which trumps these regulations. But the *Roe* abortion right belongs entirely to woman, not the physician. *Harris v. McRae*, 448 U.S. 297 (1980); *Whalen v. Roe*, 429 U.S. 589 (1977). Second, Petitioners advance a constitutional right to receive abortion information at government expense. But this Court has repeatedly held that the pregnant woman has no "constitutional entitlement to the financial resources to avail herself of the full range of protected choices." *Harris v. McRae*, 448 U.S. 297, 316 (1980).

Finally, in addition to the legal confusion *Roe* engendered, *Roe* turned traditional medical ethics on its head,

giving rise to a new "model" of medical ethics urged on this Court by Petitioners: that the legal right to abortion on demand requires physicians to ignore their ethical duty to their second patient, the unborn child, and to treat abortion and prenatal care as equally desirable options. By invalidating these regulations, this Court would impose this ethic on all governmental programs and even, by implication, on physicians throughout the land. Such an expansion of *Roe v. Wade* would sow further legal and ethical confusion, contradicts the unambiguous will of Congress that Title X funds not be used "in programs where abortion is a method of family planning," and is not justified by anything in the Constitution.

ARGUMENT

I. INTRODUCTION

Title X of the Public Health Service Act is the national family planning program, which provides annual funding of approximately $150 million to public and private agencies for "pregnancy prevention." 42 U.S.C. 300 (1982). Section 1008 of Title X provides: "None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. 300a-6 (1982).

This appeal involves a facial challenge to regulations adopted by the Secretary of Health and Human Services ("the Secretary") to enforce this critical aspect of Title X. 53 Fed. Reg. 2922 (Feb. 2, 1988) ("the regulations"); 52 Fed. Reg. 33210 (Sept. 1, 1987)). The regulations state that a Title X project "may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." 42 C.F.R. 59.8(a)(1) (1989). Because the purpose of Title X is to promote contraception and pre-pregnancy family planning, a client diagnosed as pregnant "must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of

mother and unborn child." 59.8(a)(2). To further protect maternal and fetal well-being, the pregnant woman must also be provided with any information "necessary to protect the health of mother and unborn child until such time as the referral appointment is kept." 59.8(2). In instances of medical emergency, the regulations require the Title X grantee to refer the client "immediately to an appropriate provider of emergency medical services." *Id.* Information medically necessary to assess the risks and benefits of contraceptive methods is also permitted. 59.8(a)(4).

These regulations require the Title X physician to provide accurate, relevant information. The physician is to inform the woman of her current condition. If she is pregnant, she is given a list of prenatal care providers from whom she may choose for referral. The regulations require the physician to be candid in stating that pregnancy care of any kind—prenatal care and abortion—is not a Title X service, and that abortion counseling and referral will not be provided. The only information Title X projects do not provide—that concerning pregnancy treatment options—is available upon referral from the most appropriate supplier of such information, the physician who will deliver the treatment.

The Title X client, like any patient, is free to refuse the referral or the prenatal care after referral. If she refuses the referral, she is left, like any patient, to rely on the private marketplace and on consultation with family or friends to find, if she desires, an abortion. If she accepts the referral (and the required "information necessary to protect the health of the mother and unborn child until such time as the referral appointment is kept"), she may then refuse prenatal care, but she will have had the benefit of counseling and health care for her and her child.

Unmasked, Petitioners' claim is that "good medicine" requires direct, immediate referral for elective abortion without presentation of available alternatives from a

prenatal care provider. With this, we profoundly and strenuously disagree. It is a policy in striking contrast to centuries of medical ethics and harmful to both patients presented in a pregnancy. These regulations present a positive alternative for pregnant Title X clients —many of whom are poor and minority—who may never know the alternatives that may be available in giving birth to their child. *See* Appendix B (Affidavit of Richard T.F. Schmidt, M.D., FACOG).[2]

II. THESE REGULATIONS EMBODY THE HIGHEST STANDARDS OF MEDICAL ETHICS BY PROMOTING THE HEALTH OF MOTHER AND CHILD.

> Every word and every act by all who come in contact with the pregnant woman should impress upon her both the importance and the availability of prenatal care for her fetus and herself. All too often, especially in public clinics, the strong impression has been propagated that such care is not really available without great expenditure of physical and emotional effort by her, and, too often, of money beyond her ability to pay.[3]

A. Prenatal Care is a Preeminent Need for Every Mother and Child.

Prenatal medicine is premised on the longstanding ethical principle that the obstetrician has a duty to promote the health and well-being of two patients, mother and unborn child.[4] Consistent with the Hippocratic ethic

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[2] Steinberg, *Abortion Counseling: To Benefit Maternal Health*, 15 Am. J. Law & Med. 483 (1989); E.V. Mech, *Orientations of Pregnancy Counselors Toward Adoption*, Report prepared for the Office of Adolescent Pregnancy Programs, U.S. Department of Health and Human Services, Grant #APR 000902 (1984).

[3] Pritchard, MacDonald & Gant, *Williams Obstetrics* 246 (17th ed. 1985).

[4] We use the terms "fetus" and "unborn child" interchangeably throughout this brief because law, medicine, and medical jurisprudence have traditionally used both terms to refer to the unborn

of "doing no harm" to one's patients, prenatal care does not pit mother and fetus in an adversarial relationship with competing interests, but, rather strives to serve the health interests of each patient. The most recent edition of *Williams Obstetrics* states unequivocally that obstetricians "must be concerned simultaneously with the lives and well-being of two persons, indeed, the lives of two who are interwoven."[5]

Prenatal care has long been recognized as critical to protecting maternal and fetal health.[6] For centuries, physicians have understood that a woman's care, behavior, and health during pregnancy affected her unborn child.[7] The American College of Obstetricians and Gynecologists instructs that "[e]very woman should have a comprehensive program of antepartum care that begins

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human without regard to the time of gestation. *See e.g., Evans v. People*, 49 N.Y. 86, 90 (1872); *Hall v. Hancock*, 32 Mass. (15 Pick.) 255, 256 (1834); T. Denman, *An Introduction to the Practice of Midwifery* 287 (3d ed. 1829); 1 W. Blackstone, *Commentaries on the Laws of England* 129 (U. Chicago Reprint 1979); 2 H. Richardson & G. Sayles, *Fleta* 60-61 (Seldon Society ed. 1955) ("a quickened child in her womb"); Ruth, *The Effect of Opium on the Unborn Child*, 10 J.A.M.A. 293 (1888).

[5] Cunningham, MacDonald & Gant, *Williams Obstetrics* vii (18th ed. 1989).

[6] *See Generally*, D. Danforth & J. Scott, *Obstetrics and Gynecology* 5 (5th ed. 1986); H. Speert, *Obstetrics and Gynecology in America: A History*, 142-143 (A.C.O.G. 1980). Direct therapy for unborn infants appeared as far back as 1928, when transabdominal application of drugs for fetal asphyxia was introduced. Dudenhausen, *Historical and ethical aspects of direct treatment of the fetus*, 12 J. Perinatal Med. 17 (1984 Supp.).

[7] *See generally*, Hemminki, *Content of Prenatal Care in the United States*, 26 Med. Care 199 (1988); Taussig, *The Story of Prenatal Care*, 34 Am. J. Ob. Gyn. 731 (1937). American prenatal care originated in Boston, led by Charles Green of Harvard's Department of Obstetrics in 1891. Two decades later, J. Whitridge Williams (i.e., *Williams Obstetrics*) became an ardent supporter of systematic prenatal care. Speert, *Obstetrics and Gynecology in America: A History* at 142-43.

as early in the first trimester of pregnancy as is possible." [8]

As understanding of the maternal-fetal relationship has evolved, so has prenatal care. Recent research demonstrating the risk of fetal harm posed by otherwise routine behavior, such as maternal smoking, tobacco chewing, alcohol use, carbon-monoxide exposure, coffee consumption, heavy work, and sexual intercourse highlights the vital importance of early prenatal care.[9] The scope of prenatal care recommended from early in pregnancy has expanded to encompass health assessment, medical services, social services, nutritional services, patient education, and psychological support. Ryan, et al., *Prenatal care and pregnancy outcome*, 137 Am. J. Ob. Gyn. 876 (1980).[10] Numerous studies document that proper prenatal care decreases likelihood of prematurity and fetal or neonatal mortality,[11] while inadequate pre-

[8] American College of Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services* 9 (5th ed. 1982).

[9] Socol, et al., *Maternal smoking causes fetal hypoxia: Experimental evidence*, 142 Am. J. Ob. Gyn. 214 (1982); Krishna, *Tobacco Chewing in Pregnancy*, 85 Brit. J. Ob. Gyn. 726 (1978); Streissguth, et al., *IQ at age 4 in Relation to Maternal Alcohol Use and Smoking During Pregnancy*, 25 Develop. Phych. 3 (1989); Astrup, et al., *Effect of moderate carbon-monoxide exposure on fetal development*, II:7789 Lancet 1220 (1972); Kurppa, et al., *Coffee Consumption during Pregnancy and Selected Congenital Malformations; a nationwide case-control study*, 73 Am. J. Pub. Health 1397 (1983); Manshande, et al., *Rest versus heavy work during the last weeks of pregnancy: influence on fetal growth*, 94 Br. J. Ob. Gyn. 1059 (1987); Grudzinskas, et al., *Does sexual intercourse cause fetal distress?*, II:8144 Lancet 692 (Sept. 29, 1979).

[10] *See also* Fingerhut, et al., *Delayed Prenatal Care and Place of First Visit; Differences by Health Insurance and Education*, 19 Fam. Plan. Persp. 212 (1987).

[11] Hemminki, et al., *Patterns of Prenatal Care in the United States*, 8 J. Pub. Health Pol. 330 (1987); Moore, et al., *The perinatal and economic impact of prenatal care in a low-socioeconomic population*, 154 Am. J. Ob. Gyn. 29 (1986); Ryan, et al., *Prenatal care and pregnancy outcome*, 137 Am. J. Ob. Gyn. 876 (1980).

natal care increases the likelihood of maternal and fetal morbidity.[12]

Prenatal care has proven to be a cost-effective treatment for a significant national health concern. Institute of Medicine, *Prenatal Care: Reaching Mothers, Reaching Infants* (1988). Early and adequate prenatal care results in healthier newborns. One dollar spent on prenatal care may reduce the costs of postnatal care by three dollars;[13] a savings of approximately $2,100 per patient in 1986.[14] Yet, adequate prenatal care services are either unavailable or inaccessible to a needy segment of our population. In 1985, only 68 percent of all preg-

[12] Moore, et al., *The perinatal and economic impact of prenatal care in a low-socioeconomic population*, 154 Am. J. Ob. Gyn. 29 (1986) (significantly greater neonate morbidity for women without prenatal care versus women who received prenatal care); Ryan, et al., *Prenatal care and pregnancy outcome*, 137 Am. J. Ob. Gyn. 876 (1980) ("the group with inadequate prenatal care had significantly higher fetal, neonatal, and perinatal mortality rates." "It is clear that the presence or absence of early and adequate prenatal care is strongly related to pregnancy outcome"); Tokuhata, et al., *Prenatal Care and Obstetric Abnormalities*, 76 J. Chron. Dis. 163 (1973) (prematurity rate of 6.9% with prenatal care versus 23.6% without prenatal care; 1155 congenital anomalies out of 100,000 births for those with prenatal care versus 1622 anomalies for those without prenatal care; 8365 pregnancy complications out of 100,000 births with prenatal care compared to 16,298 complications with no prenatal care).

[13] McGoldrick, *Prenatal care; Investing in the Future*, 45 J. Am. Med. Women's Assoc. 35 (1990); *see also* Brown, *Drawing Women into Prenatal Care*, 21 Fam. Plan. Persp. 73 (1989).

[14] Moore, 154 Am. J. Ob. Gyn. at 32. The U.S. Office of Technology Assessment reported that "for every low-birth-weight birth averted by earlier or more frequent prenatal care, the U.S. health care system saves between $14,000 and $30,000 in newborn hospitalization, rehospitalizations in the first year, and long-term health care costs associated with low birth weight." U.S. Congress, Office of Technology Assessment, *Healthy Children: Investing in the Future* 9 (1988).

nant women received adequate prenatal care.[15] Twenty percent of pregnant teenagers and ten percent of all black women obtain little or no prenatal care.[16] "Women who are less educated are less likely to get adequate prenatal care, and [] potential program recipients identify lack of knowledge about where to go for care as an important impediment to seeking out services." Miller et al., *Barriers to Implementation of a Prenatal Care Program for Low Income Women*, 79 Am. J. Pub. Health 62, 63 (1989). Providing adequate and prompt information regarding prenatal care resources is especially important for women with unplanned pregnancies who often delay seeking prenatal care because of negative views of the pregnancy. Brown, *Drawing Women into Prenatal Care*, 21 Fam. Plan. Persp. at 76. Methods of improving access to services include: "Improving institutional practices to make services more easily accessible and acceptable to clients; [a]ttracting women in need of prenatal care through a wide variety of casefinding methods, including . . . cross-agency referrals and the provision of incentives . . . [p]roviding social support to encourage continuation in prenatal care." *Id.* at 78.

Title X clinics can play an important role in removing the informational gap that stands as an obstacle between pregnant women and available prenatal care. By requiring direct referral for prenatal care, the Title X regulations can materially advance maternal and fetal health among those in greatest need of such assistance—the poor, minority women, and teenagers. As a link between pregnant women and networks of community organizations, physicians, and social service agencies, such

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[15] Brown, *Drawing women into prenatal care*, 21 Fam. Plan. Persp. 73, 74 (1989).

[16] McGoldrick, 45 J. Am. Med. Women's Assoc. at 35. *See also* Witwer, *Prenatal Care in the United States; Reports Call for Improvements in Quality and Accessibility*, 22 Fam. Plan. Persp. 31 (1990).

referral can contribute to decreased maternal mortality, infant mortality, and low birth weight. In this way, the challenged regulations are consistent with the highest standards of medical ethics.

B. These Regulations Will Not Cause Unnecessary Delay In Obtaining Appropriate Medical Care.

Despite the obvious benefit of such a prenatal referral network, Petitioners' challenge heavily relies on the speculation that the regulations "may" increase health risks for women and teenagers ("young women may be deterred," "teenagers, may run away from home. . . .") Brief of Petitioner, Rust (Pet. Br.) at 8 n.18.[17] It is impossible to specifically verify or refute this claim, because, as the lower courts recognized, there is no record of enforcement or experience in implementing the regulations. *State of New York v. Sullivan*, 889 F.2d 401, 414 (2d Cir. 1989). *See also Commonwealth of Massachusetts v. Secretary of Health and Human Services*, 873 F.2d 1528, 1553-54 n.11, 12 (1st Cir. 1989) (Torruella, J., concurring in part, dissenting in part). However, Petitioners' hypothetical worst case scenario is wholly inadequate to invalidate these regulations. As recently as *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990), this Court rejected such a facial challenge for failing to show that "no set of circumstances exists under which the Act would be valid." 110 S. Ct. at 2980-

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[17] The claimed result of these regulations is identical to the claimed result of the Hyde Amendment in *Harris v. McRae*, 448 U.S. 297 (1980). But the claimed results of the Hyde Amendment were found to be highly unreliable. *Cf.* Petitti & Cates, *Restricting Medicaid Funds for Abortions: Projections of Excess Mortality for Women of Childbearing Age*, 67 Am. J. Pub. Health 860 (1977) (predicting up to 90 deaths annually if publicly funded abortions were restricted by the Hyde Amendment) *with* Gold & Cates, *Restrictions of Federal Funds for Abortion: 18 Months Later*, 69 Am. Pub. Health 929, 929 (1979) (finding three deaths "associated to some degree" with the funding restriction).

81 (quoting *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3060 (O'Connor, J., concurring)).

Nevertheless, Petitioners' contention that the regulations pose significant health risks to pregnant patients ignores several facts. First, it flies in the face of the express requirement that all pregnant Title X patients be referred directly for appropriate prenatal care. Second, Title X is neither intended, nor set-up, to treat the pregnant woman, regardless of what her eventual "treatment" might be. Therefore, a referral is inevitably involved. 53 Fed.Reg. at 2937. Nonetheless, by referring the woman directly to a health care provider who can treat the client's comprehensive medical needs, delays caused by difficulty in locating a prenatal care provider will be lessened.

Third, upon diagnosis of pregnancy, Title X projects must provide information that will "protect maternal and fetal health until a provider of prenatal care is secured for the client." 53 Fed.Reg. at 2937. Thus, the woman is not "pushed out the door" and "forced to fend for herself" in finding a prenatal care provider, as Petitioners suggest. Pet. Br. at 8 n.18. The project also provides the woman with information about good health practices during pregnancy. 59.8(a)(2).

Fourth, women often delay obtaining abortions for reasons totally unrelated to these regulations. According to a study performed by the Alan Guttmacher Institute, affiliated with Planned Parenthood, 71% of women who have abortions at 16 or more weeks gestation, "attributed their delay to not having realized they were pregnant or not having known soon enough the actual gestation of their pregnancy." Torres & Forrest, *Why Do Women Have Abortions?*, 20 Fam. Plan. Persp. 169 (July/August 1988). Petitioners simply ignore the complexity of the reasons why women delay seeking abortion.

More telling is Petitioners' refusal to recognize that nearly every action contributing to an informed decision

will cause "delay." To condemn the decision-making process as causing an unwelcome "delay" belittles the profound nature of the pregnant woman's situation. In fact, physician involvement itself has been "associated with both conflict and delayed abortion." Rosen, *The Patient's View of the Role of the Primary Care Physician in Abortion*, 67 Am. J. Pub. Health 863, 864 (1977).[18]

Of course, none of Petitioners' arguments regarding "delay" is balanced against the almost certain death to the unborn child caused by abortion. But Government has a "compelling interest" in the life of the unborn child "throughout pregnancy," which the Government may protect in its funded programs. *Webster; Harris.* Petitioners also fail to question the potential for psychological sequelae from abortion,[19] or the pattern of men coercing women to obtain elective abortions and how this might be compounded by immediate, direct referral for elective abortion.[20] Nor do Petitioners question the possible relationship between a practice of immediate, direct referral for election abortion and the rate of repeat abortion which

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[18] *Cf. City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 473 (1983) (O'Connor, J., dissenting): "It is certainly difficult to understand how the Court believes that the physician-patient relationship is able to accommodate any interest that the State has in maternal physical and mental well-being in light of the fact that the record in this case shows that the relationship is nonexistent." *See also*, D. Reardon, *Aborted Women: Silent No More* (1987).

[19] *See e.g.*, S. Nathanson, *Soul Crisis: One Woman's Journey Through Abortion to Renewal* (1989); McAll & Wilson, *Ritual Mourning for Unresolved Grief After Abortion*, 80 S. Med. J. 817 (1987).

[20] *See e.g.*, S. Nathanson, *Soul Crisis* (1989); A. Shostak & G. McLouth, *Men and Abortion: Lessons, Losses and Love* (1984). A study of 81 women at the Medical College of Ohio found that more than one-third felt that they had been coerced into their decision for abortion. Franco, et al., *Psychological Profile of Dysphoric Women Postabortion*, 44 J. Am. Med. Women's Assoc. 113 (1989).

has climbed to 42.9%. Henshaw, et al., *The Characteristics and Prior Contraceptive Use of U.S. Abortion Patients*, 20 Fam. Plan. Persp. 158, 159 (1988) (Table 1).[21]

The regulations require prompt referral for prenatal care, the essence of which is to address any health dangers a pregnancy poses to the pregnant woman and her child. Rather than "pos[ing] serious health dangers," referral under the regulations may ameliorate conditions needing medical attention. To claim that these regulations leave pregnant women with "no other source of medical advice" is most disingenous when the regulations require direct referral to non-Title X medical personnel. And the claim that these regulations fail to meet the medical needs of pregnant women with serious medical conditions who "need" abortion ignores completely the reality that approximately 95% of the 1.5 million abortions performed annually in the United States are elective and have no relation to the health needs of the women.[22] The claim of Petitioners and their *amici* that these regulations "pose serious health dangers to patients," then, is nothing more than a counter policy judgment: elective abortion is better than childbirth. But this

[21] To the extent that Petitioners argue that these regulations will have an impact on access to abortion, they support the Secretary's claim that current Title X practices "encourage" or "promote" abortion as a method of family planning in contravention of Congressional intent. J.A. 37, 56-57.

[22] Approximately "two percent of all abortions in this country are done for some clinically identifiable entity—physical health problem, amniocentesis, and identified genetic disease or something of that kind." The remainder are elective, "performed on women who for various reasons do not wish to be pregnant at this time." *Constitutional Amendments Relating to Abortion: Hearings on S.J. Res. 17, S.J. Res. 18, S.J. Res. 19, and S.J. Res. 10 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 97th Cong., 1st Sess. 158 (1981) (statement of Irvin M. Cushner, M.D., M.P.H., U.C.L.A. School of Public Health); *see also* Torres & Forrest, *Why Do Women Have Abortions?*, 20 Fam. Plan. Persp. 169 (1988).

is not a policy that Congress or the Secretary need adopt in public programs.[23]

C. The Same Ethical Standards Embodied In the Regulations Were Relied Upon by the Sponsors of Title X In Establishing the Abortion Prohibition in Section 1008.

Section 1008 of Title X expresses a clear policy preference favoring childbirth over abortion. This Court has repeatedly affirmed that such a preference is within the constitutional prerogatives of Congress and may be reflected in its funding of federal programs. *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464, 478 & n.11 (1977). Rep. John Dingell (D. Mich.), the sponsor of section 1008, articulated this same preference:

> During the course of House hearings on H.R. 19318 there was some confusion regarding the nature of the family planning programs envisioned, whether or not they extended to include abortion as a method of family planning. With the "prohibition of abortion" amendment—Title X, section 1008—the committee members clearly intend that *abortion is not to be encouraged or promoted in any way through this legislation.* Programs which include abortion as a method of family planning are not eligible for funds allocated through this act.
>
> Several considerations prompt this action.
>
> There is a fundamental difference between the prevention of conception and the destruction of developing human life. Responsible parenthood requires different attitudes toward human life once conceived than toward the employment of preventive contraception devices or methods. What is unplanned contraceptively does not necessarily become unwanted humanly. Whether a conceived child is

[23] For a fuller refutation of Petitioners' argument, *see Brief of Feminists for Life of America, et al., as Amici Curiae in Support of Respondent.*

loved or unloved is dependent on factors that, at best, can only be marginally related to family planning.

116 Cong.Rec. 37365, 37375 (1970) (emphasis supplied). Rep. Dingell supported this distinction between preconception family planning and abortion by citing medical and legal texts that discussed the nature and rights of the unborn child. *Id.* at 37365-79. This clear statement of purpose should guide this Court's inquiry, as "[i]t is the sponsors that we look to when the meaning of the statutory words is in doubt." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951). *See also id.* at 399-400 (Frankfurter, J., dissenting). The Secretary's policy, then, is consistent with medicine and the purposes of Congress.

III. PHYSICIANS HAVE NO ETHICAL OBLIGATION TO COUNSEL OR REFER FOR ELECTIVE ABORTION.

A. The Physician Has a Traditional Ethical Duty to Promote the Health of His Two Patients, the Mother and Unborn Child.

Medicine's traditional endorsement of prenatal care for mother and child operates on the premise that the obstetrician should promote the health of two patients: the mother and unborn child. This goal of prenatal care conforms to the Hippocratic tradition of "doing no harm" to one's patients. Counseling and referral for elective abortion directly violates traditional medical ethics by utterly ignoring the ethical obligation that the physician has to his second patient, the unborn child. These regulations are thus superior to Petitioners' scheme in meeting the highest standards of medical ethics.

Perhaps the most important principle of medical ethics is the physician's obligation to promote the life and health of his patient. Traditional American medical ethics have always treated the unborn child as a patient,

although the degree to which medicine could treat that patient has always been dependent on the development of medical science.[24] Contemporary medical ethics reaffirms the unborn child as a distinct patient.[25] "Indeed, the fetus is no longer dealt with as a maternal appendage

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[24] "[T]he health of the fetus has always been a concern. . . . In some obvious nontechnical senses, the fetus has always been regarded as a patient." Shinn, *"The Fetus As Patient: A Philosophical and Ethical Perspective,"* in Milunsky & Annas, eds., *Genetics and the Law III* 318 (1985). *See also* Bowes & Selgestad, *Fetal Versus Maternal Rights: Medical and Legal Perspectives*, 58 Ob. & Gyn. 209, 213 (1981). "Prior to recent developments in fetal surgery, the fetus generally was considered a medical patient and certain defects were treated with medicines administered to the mother or directly into the amniotic fluid." Blank, *Emerging Notions of Women's Rights and Responsibilities During Gestation*, 7 J. Legal. Med. 441, 461 (1986).

[25] *See generally* K. Maeda, ed., *The Fetus As A Patient '87: Proceedings of the Third Inter'l Symposium* (1987); A. Kurjak, ed., *The Fetus as a Patient, Proceedings of the First International Symposium* (1985); M. Harrison, et al., *The Unborn Patient: Prenatal Diagnosis and Treatment* (1984); E. Volpe, *Patient in the Womb* (1984); Manning, *Reflections on Future Directions of Perinatal Medicine*, 13 Sem. Perin. 342 (1989); Mahoney, *Editorial; The Fetus as Patient*, 150 West. J. Med. 459 (1989); Newton, *The Fetus as a Patient*, 73 Med. Clin. N. Amer. 517 (1989); Rosner, et al., *Fetal therapy and surgery: Fetal rights versus maternal obligations*, 89 N.Y. State J. Med. 80 (1989); Brodner, et al., *Fetal Therapy; Ethical and Legal Implications of Prenatal Intervention and Clinical Application*, 2 Fetal Ther. 57, 58 (1987); Chervenak, et al., *Ethical Analysis of the intrapartum management of pregnancy complicated by fetal hydrocephalus and macrocephaly*, 68 Obst. & Gyn. 720 (Nov. 1986); Chervenak & McCullough, *Perinatal ethics: a practical method of analysis of obligations to mother and fetus*, 66 Obst, & Gyn. 442 (1985); Shinn, "The fetus as patient," in Milunsky & Annas, eds., *Genetics and the Law III* 317-329 (1985); Lenow, *The Fetus as a Patient: Emerging Rights as a Person?*, 9 Am. J. Law & Med. 1 (1983); Gilmore, *Is the fetus a patient?*, 128 Can. Med. Assoc. J. 1472 (1983); Harrison, *Unborn: Historical perspective of the fetus as a patient*, 45 The Pharos 19 (1982); P. Ramsey, "Screening: An Ethicist's View," in B. Hilton, et al., *Ethical Issues in Human Genetics* (1973).

ultimately to be shed at the whim of biologic forces beyond control. Instead, the fetus has achieved the status of the second patient, a patient who usually faces much greater risks of serious morbidity and mortality than does the mother." Pritchard, MacDonald & Gant, *Williams Obstetrics* 267 (17th ed. 1985). "[T]he status of the fetus has been elevated to that of a patient who should be given the same meticulous care by the physician that we long have given the pregnant woman." *Id.* at 139.

Such traditional principles of medical ethics are reinforced by new advances in medical technology. New fetal visualizing and diagnostic techniques such as sonography —now routine in the fifteenth or sixteenth week of pregnancy—have had a tremendous impact in altering society's perception of the once "hidden" fetus. Parents are now able to see their children, with detailed, individual facial features and movements months before birth.[26] *In utero* treatments have been performed successfully for hydrocephalus, hydrops fetalis associated with maternal Rh sensitization, congenital adrenal hyperplasia, urinary tract malformation, congenital hydronephrosis, perinatal asphyxia, and congenital cystic adenomatoid malformation.[27] Intrauterine blood transfusions also have been

[26] "The more that parents actually see the fetus and recognize a human form, the more valuable will that fetus become in their eyes. . . . [S]ince ultrasound is being more routinely used in obstetrical practice and is indicated for many high-risk pregnancies, we have good reason to believe that a more complex and progressively more human relationship will begin to develop between parents and fetuses." Harrison, *The Unborn Patient* at 165.

[27] Frigoletto, et al., *Antenatal Treatment of Hydrocephalus by Ventriculoamniotic Shunting*, 248 J.A.M.A. 2496 (1982); McCullough, *A History of the Treatment of hydrocephalus*, 1 Fetal Ther. 38 (1986); Editorial, *Prenatal Treatment of Congenital Adrenal Hyperplasia*, 335 Lancet 510-511 (March 3, 1990); Golbus, et al., *In utero treatment of urinary tract obstruction*, 152 Am. J. Ob. Gyn. 383 (1982); Harrison, et al., *Management of the fetus with a urinary tract Malformation*, 246 J.A.M.A. 635 (1981); Manning, et al., *Antepartum chronic fetal vesicoamniotic shunts for obstructive uropathy; a report of two cases*, 145 Am. J. Ob. Gyn. 819 (1983); Vallancien, et al., *Percutaneous Nephrostomy in Utero*, 20 Urology 647 (1982); Harrison, et al., *Fetal surgery for Congenital hydronephrosis*, 306 N. Eng. J. Med. 591 (1982); Kirkinen, et al., *Repeated transabdominal renocenteses in a case of fetal hydronephrotic kidney*, 142 Am. J. Ob. Gyn. 1049 (1982); Jacobs, et al., *Prevention, Recognition, and Treatment of Perinatal Asphyxia*, 16 Clin. Perin. 785 (1989); Nugent, et al., *Prenatal Treatment of Type I Congenital Cystic Adenomatoid Malformation by Intrauterine Fetal Thoracentesis*, 17 J. Clin. Ultra. 675 (1989).

performed for a variety of fetal diseases.[28] Fetal surgery has also been performed by removing the fetus from the uterus, operating, and then replacing the fetus into the uterus.[29]

Fetal therapy may be conducted nearly throughout pregnancy. Proper control of a diabetic mother's fuel metabolism at six to eight weeks of gestation can prevent fetal malformations. Nelson, *Diabetes and Pregnancy: Control Can Make a Difference*, 61 Mayo Clin. Proc. 825 (1986). Additional therapy available for pre-viable, unborn children in the first trimester include treatments for congenital adrenal hyperplasia, some vitamin-responsive inborn errors of metabolism, neural tube defects, and fetal cardiac arrhythmias.[30] As one expert has stated,

[28] Gonsoulin, et al., *Serial Maternal Blood Donatations for Intrauterine Transfusion*, 75 Ob. Gyn. 158 (1990); Keckstein, et al., *Intrauterine treatment of severe fetal erythroblastosis: intravascular transfusion with ultrasonic guidance*, 17 J. Perin. Med. 341 (1989); Pattison, et al., *The Management of Severe Erythroblastosis Fetalis by Fetal Transfusion: Survival of Transfused Adult Erythrocytes in the Fetus*, 74 Ob. Gyn. 901 (1989); Peters, et al., *Cordocentesis for the Diagnosis and Treatment of Human Fetal Parvovirus infection*, 75 Ob. & Gyn. 501 (1990); Pringle, *Fetal surgery: It has a Past, Has it a Future?* 1 Fetal Ther. 25 (1986).

[29] *See e.g.*, Harrison, et al., *Successful Repair in Utero of a Fetal Diaphragmatic Hernia after Removal of Herniated Vicera from the Left Thorax*, 332 N. Eng. J. Med. 1582 (1990).

[30] Schulman, *Treatment of the Embryo and the Fetus in the First Trimester*, 35 Am. J. Med. Genetics 197 (1990).

speaking in 1980, "the last decade was the decade of prenatal diagnosis, but this decade will be the decade of prenatal therapy—not only prenatal surgery but other medical intervention." [31] Even though fetal surgery is a relatively new phenomenon, "there exists a likely possibility that prenatal therapeutic interventions will become an accepted standard of medical care." [32] As medical treatment has been extended back to the earliest point of *in utero* human life, "one can expect a new level of respect for the previable fetus whose disorders were previously diagnosable but untreatable." [33] Basic prenatal care is necessary for these patients.

B. Counseling and Referral for Elective Abortion Violates the Ethical Obligation that a Physician Has to His Two Patients, the Mother and Child.

The concept of the fetal patient imposes an affirmative duty on the physician. When a physician enters into a relationship with a pregnant woman, that physician establishes duties towards two patients, mother and unborn child. Once the relationship exists, the physician is bound to provide all due care in nurturing the health and life of both patients.

The fetus' patient status flows from the biologically human nature of the fetus, not from maternal consent. Physicians have a moral obligation to the fetal patient apart from the mother's interests. This ethical duty is not eclipsed by the mother's desire for an elective abortion. It is ethically untenable that a physician must abandon his duty to the fetal patient merely upon the mother's desire to be rid of the fetus. Abortion counseling and referral flatly contradict the shared premise of prenatal care and fetal therapy; that is, a medical obligation to the fetus as well as to the mother. Because of this dual obligation, a physician is neither legally nor morally required to provide information about elective abortion to a pregnant patient. Presenting elective abortion as an acceptable "option" jeopardizes the life of a physician's fetal patient. The accepted premises of prenatal care and fetal therapy have reconfirmed that the practice of elective abortion is utterly repugnant to the traditional ethics and goals of medicine.[34]

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[31] Harrison, et al., *Correction of Congenital Diaphragmatic Hernia in Utero*, 16 J. Ped. Surg. 934, 942 (1981).

[32] Lenow, *Prenatal Intervention: Duty v. Liability*, 13 Leg. Aspect. Med. Prac. 1-2 (1985).

[33] Harrison, *The Unborn Patient* at 164.

IV. PHYSICIANS HAVE NO LEGAL OBLIGATION TO COUNSEL OR REFER FOR ELECTIVE ABORTION.

A. The Doctrine of Informed Consent Does Not Require A Physician to Counsel or Refer for an Elective Treatment That He Neither Provides Nor Holds Himself Out to the Community As Providing.

The Petitioners claim that these regulations prevent Title X clients from receiving complete information and, thus, violate the doctrine of informed consent. This claim ignores both the nature of informed consent and government's traditional authority to regulate the medical profession, including physician-patient communication.

Informed consent doctrine requires that physicians have their patient's "informed consent" before proceeding with medical treatment:

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[34] "The fetus now begins to make serious claims for a right to nutrition, to protection, to therapy. How can tolerance of abortion be morally reconciled with those claims?" Ruddick & Wilcox, *Operating on the Fetus*, 12 Hast. Cent. Rep. 10, 11 (1982) (quoting Richard McCormick); "The paradox here for the abortion debate is evident: a moral status that is denied the fetus when abortion is sought is given the fetus when its future healthy development is desired, though the same generic organism is under consideration." Callahan, *How Technology is Reframing the Abortion Debate*, 16 Hast. Cent. Rep. 33, 37 (1986).

> [T]he doctrine of informed consent arises out of the unquestioned principle that absent extenuating circumstances a patient has the right to exercise control over his or her body by making an informed choice concerning whether to submit to a particular medical procedure. [cit. omit.] Thus, a doctor recommending a particular procedure generally has, among other obligations, the duty to disclose to the patient all material risks involved in the procedure.

Pauscher v. Iowa Methodist Center, 408 N.W.2d 355, 358 (Iowa 1987). An action for violation of informed consent is a form of medical malpractice and thus requires proof of the common law elements of duty, breach, causation, and damage. *See e.g., Prooth v. Wallsh*, 105 Misc.2d 603, 432 N.Y.S.2d 663 (1980). To establish a duty, there must be a physician-patient relationship or an agreement to provide services.[35] A duty to inform only arises once the physician has agreed to provide services, has "proposed" treatment, or a physician-patient relationship *for those services* exists. The physician must "undertake" to provide the service or "prescribe" the service or treatment. *Ferguson v. Wolkin*, 131 Misc.2d 304, 305, 499 N.Y.S.2d 356, 357 (1986); *Nichelson v. Curtis*, 117 Ill. App.3d 100, 452 N.E.2d 883 (1983); *Taber v. Riordan*, 83 Ill.App.3d 900, 403 N.E.2d 1349, 1353 (1980). Informed consent involves a "reasonable disclosure of the available choices with respect to proposed therapy and of the danger inherently and potentially involved in each." *Cobbs v. Grant*, 8 Cal.3d 239, 243, 502 P.2d 1, 10 (1972). However, "it is clearly not necessary that every physician or health care provider who becomes involved with a patient obtain informed consent to every medical

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[35] *Salzman v. Rosell*, 129 A.D.2d 833, 513 N.Y.S.2d 846 (1987); *United Calender Mfg. Corp. v. Huang*, 94 A.D.2d 176, 463 N.Y.S.2d 497, 500 (1983); *Ferguson v. Wolkin*, 131 Misc.2d 304, 499 N.Y.S.2d 356, 357 (1986); *Prooth v. Wallsh*, 105 Misc.2d 603, 432 N.Y.S.2d 663 (1980).

procedure to which the patient submits. *Rather, it is the responsibility of a physician to obtain informed consent to those procedures and treatments which the physician actually prescribes or performs.*" *Nisenholtz v. Mount Sinai Hospital*, 126 Misc.2d 658, 483 N.Y.S.2d 568, 572 (1984) (emphasis supplied):

> Courts in other states appear to have adhered to the rule that a physician's duty to obtain informed consent from a patient arises only when the physician formally orders or actually performs a procedure or conducts a course of treatment. For example, in *Hallay v. Birbiglia*, [cit. omit.], a doctor who examined a child and *recommended* a test which caused injury to the child, was not held liable because he did not formally order the test . . . In *Berkey v. Anderson* [cit. omit.], the court found that a physician who prescribed a myleogram could be found liable for failing to obtain informed consent when the patient was injured during the performance of the procedure by another physician.

Id. at 572 (emphasis in original). The physician "can only be liable for breach of duty with respect to those functions he was required to undertake." *Ferguson*, 499 N.Y.S.2d at 357. Accordingly, if the physician does not propose a treatment or procedure for the patient's condition because such treatment is beyond that which the physician can or will provide, the physician has no duty to inform the patient concerning the treatment or procedure.

The straightforward application of these basic principles refutes Petitioners' claim that physicians in Title X clinics must provide information about a elective abortion. The regulations require that patients are informed upon inquiry that Title X does not provide abortions or abortion counseling and referral services. Such disclosure bolsters clear physician-patient communication and is consistent with the doctrine of informed consent. The Title X program is neither designed nor funded to treat, but

rather to avert, pregnancy. Treatment of pregnancy is not a Title X service. Therefore, information about such treatment, e.g., abortion, is not a part of the program. As the treatment cannot be provided under Title X, there is no treatment decision to be made, and there can be no obligation on Title X physicians to provide such information. Because the program itself prohibits the treatment, the doctrine of informed consent is not even implicated. The regulations thus complement the 1970 statutory prohibition on the performance of elective abortion by requiring any discussion concerning elective abortion to be conducted at the time and in the location that is most logically and ethically related to the performance of any elective abortion—with the physician who might provide such services. In the same way, the duty to warn the patient of the benefits and burdens (complications, dangers, risks, hazards) of a treatment that the physician is willing and able to perform and is now proposing is simply not involved.

In this way, these implementing regulations will *affirmatively protect* physician from medical malpractice claims. Clients will be apprised that the purpose of Title X is to provide subsidized contraception and prepregnancy family planning, and that Congress funds only those services. The regulations exclude from the scope of the program actions by physician relating to abortion that might give rise to a malpractice claim related to pregnancy treatment.

Similarly, Petitioners' contention that these regulations will permit wrongful birth/wrongful life actions against physicians in Title X programs cannot be sustained. These actions, like those for violation of informed consent, require that the physician is in a position to propose, offer, or perform prenatal care, genetic testing, or abortions. *See e.g., Becker v. Schwartz*, 46 N.Y.2d 401 (N.Y. 1978). Such allegations cannot be made against a Title X physician. By providing full and clear information that

Title X programs provide only contraception and prepregnancy family planning, these regulations will affirmatively shield physicians in Title X programs from medical malpractice claims based on a failure to counsel or refer for abortion under Title X.[36]

In addition to ignoring the ethical and practical limitations on informed consent, Petitioners fail to recognize traditional governmental authority to regulate medical practice and *speech* between physician and patient through the regulation of informed consent. This Court has long recognized a state's power to protect the health of its citizens through the exercise of legislative authority, including regulations of the medical profession.[37] Many states have enacted informed consent statutes to regulate specific medical, including gynecological, procedures.[38] Moreover, states have increased their regulation by requiring the communication of certain, specific information. States are requiring the provision of information of certain specified risks for medical procedures such as breast cancer treatment,[39] hysterectomies,[40]

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[36] Wrongful birth/life claims are a direct result of this Court's decision in *Roe v. Wade*. But several states have abolished these suits by statute. Idaho Code 5-334 (1990); Minn. Stat. Ann. 145.424 (West 1989); S.D. Codified Laws Ann. 21-55-2 (Supp. 1985); Utah Code Ann. 78-11-24 (Supp. 1985). By judicial decision, North Carolina and Missouri have refused to recognize either wrongful birth or wrongful life suits. *Wilson v. Kuenzi*, 751 P.2d 741 (Mo. 1988), *cert. denied*, 109 S.Ct. 229 (1988); *Azzolino v. Dingfelder*, 337 S.E.2d 528 (N.C. 1985), *cert. denied*, 107 S.C. 131 (1986). Most state courts have refused to recognize wrongful *life* suits. Such statutory or judicial prohibitions are constitutional. *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986).

[37] *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); *Barsky v. Board of Regents*, 347 U.S. 442 (1954); *Watson v. Maryland*, 218 U.S. 173, 176 (1910); *Dent v. West Virginia*, 129 U.S. 114, 122 (1889).

[38] Statutes set forth in Appendix C.

[39] Cal. Health & Safety Code sec. 1704.5 (West Supp. 1990); Fla. Stat. Ann. sec. 458.324, 459.0125 (West Supp. 1990); Ga. Code Ann. sec. 43-34-21 (1988); Haw. Rev. Stat. sec. 67-3(c) (1985);

sterilizations,[41] and AIDS treatment.[42] California, for example, requires physicians to provide to patients a state-written "standardized written summary which explains the advantages, disadvantages, risks and descriptions of autologous blood and directed and nondirected homologous blood. . . ." Cal. Health & Safety Code 1645. California physicians are also required to provide to patients with breast cancer treatment a state-written summary of the "advantages, disadvantages, risks and descriptions of the procedures with regard to medically viable and efficacious alternative methods of treatment. . . ." Cal. Health & Safety Code 1704.5. The Petitioners may quibble over exactly what these statutes require, but there

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Ky. Rev. Stat. 311.935 (Baldwin 1987); Mich. Comp. Laws Ann. 333.17013 (West Supp. 1990-91); Minn. Stat. Ann. 144.651(9) (West 1989); N.J. Rev. Sat. Ann. 45:9-22 (West Supp. 1989-90); N.Y. Pub. Health Law 2404 (McKinney Supp. 1990); Pa. Cons. Stat. Ann. tit. 35, 5641 (Purdon Supp. 1990-91); Va. Code Ann. 54.1-294 (1988).

[40] 42 C.F.R. 441.250-.259 (1989); Cal. Health & Safety Code 1690, 1691 (West Supp. 1990); Md. Health Gen. Code Ann. 19-348 (1990) (hospital in-patients' opportunity to receive papanicolaou smear); Ohio Rev. Code Ann. 3701.60 (Anderson 1988) (hospital in-patients' opportunity to receive uterine cytologic examination).

[41] 42 C.F.R. 441.250-.259 (1989); Cal. Wel. & Inst. Code 14191, 14192 (West 1990); Conn. Gen. Stat. ann. 45-78q, -78r (West 1981); Ky. Rev. Stat. Ann. 212.341-.347 (Baldwin 1982); Me. Rev. Stat. Ann. tit. 34-B 7003, 7004 (West 1988); Or. Rev. Stat. 436.225-325 (1989); Utah Code Ann. 62A-6-102 (1989); Va. Code Ann. 54.1-2974 (1988).

[42] Cal. Health & Safety Code 1603.1, 1603.3 (West Supp. 1990); Del. Code Ann. tit. 16, 1201, 1202 (Supp. 1988); Fla. Stat. Ann. 381.609, 381.6105, 641.3007 (West Supp. 1990); Haw. Rev. Stat. 325-16 (Supp. 1989); Ill. Ann. Stat. ch. 111½, para. 7303-7309 (Smith Hurd 1988); Me. Rev. Stat. Ann. tit. 5, 19203-A (1989); Md. Health Gen. Code Ann. 18-336 (1990); Mich. Comp. Laws Ann. 333.5133 (West Supp. 1990-91); Mont. Code Ann. 50-16-1001, 50-16-1007 (1979); N.Y. Pub. Health Law 2781 (McKinney Supp. 1990); N.Y. Ins. Law 2611 (McKinney Supp. 1990); Or. Rev. Stat. 433.045 (1989); R.I. Gen. Laws 23-6-12, 23-6-14 (1989); W. Va. Code 16-3C-2 (Supp. 1989); Wis. Stat. Ann. 144.025 (West 1989).

can be no doubt that the states have traditionally regulated this area.

B. The Legal Standard is that Physicians Need Not Counsel or Refer for Elective Abortion.

In addition to the more general limitations on the doctrine of informed consent, legislation in most states specifically protects the refusal to provide abortion counseling and referral. The law in at least 43 states is that physicians need not perform, suggest, or counsel for abortion.[43] Federal law also provides that no grantee of federal funds may "discriminate" against "any physician or other health care personnel . . . because he refused to perform or assist in the performance" of an abortion. 42 U.S.C. 300a-7(b)(1)(B) (1982); J.A. 17, 63-65. Therefore, whether a physician will counsel and refer for abortion as a method of family planning is, as long as *Roe v. Wade* survives, entirely a matter of the personal choice of the physician. It is not a mandatory legal or ethical standard and should not be imposed as a rule of constitutional law by this Court.

V. CONGRESS AND THE ADMINISTRATION MAY PROPERLY DECIDE TO PROMOTE THE TRADITIONAL MODEL OF MEDICAL ETHICS IN FAVOR OF CHILDBIRTH IN A FEDERALLY FUNDED PROGRAM.

Petitioners' charge that physicians have an ethical obligation to counsel and refer for elective abortions which the government must fund in its Title X clinics is yet another attempt to expand *Roe v. Wade*, 410 U.S. 113 (1973). This latest attempt asks the Court to adopt Petitioners' particular ethical model as another chapter

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[43] Statutes set forth in Appendix D. Of course, 50 states prohibited abortion more tightly before *Roe v. Wade* and at least 15 states banned the advertisement of abortion services and/or abortifacients. *See* Linton, *Enforcement of State Abortion Statutes After* Roe: *A State-By-State Analysis*, 67 U.Det. L.R. 157 (1990).

in *Roe*'s medical regulatory framework. However, *Roe* requires no such expansion. Neither does medical ethics.

Roe v. Wade sparked a volatile conflict by imposing, by implication, throughout the country a new ethical model into the relationship between the pregnant woman, her unborn child, and the physician. While medical ethics has traditionally embraced a beneficence model, *Roe* seemed to disregard this standard in the abortion context.[44] The beneficience principle "requires that one help others further important and legitimate interests and abstain from injuring them."[45] For centuries the benefience principle embodied in the Hippocratic Oath has been viewed as "the proper moral end of medicine, and commitment to that end makes one a physician." *Id.* at 29. Straightforward application of the beneficence principle to the fetal patient requires that physicians promote the health of the fetus (as in prenatal care and fetal therapy), and refrain from harming the fetus (as in abortion). By proscribing abortion and counseling for abortion, the Hippocratic Oath allowed no doubt on this point.

In contrast to the beneficence model, the autonomy model "interprets the best interests of the patient exclusively from the perspective of the patient, as he or she understands them. This perspective may sometimes be starkly different from that of medicine."[46] The physician no longer is duty-bound to do good; but rather is to carry out the client's requests. When the principles of beneficence and autonomy conflict, a delicate balance must be struck. For example, a Jehovah's Witness' autonomy

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[44] "*Roe v. Wade* and the related cases stand almost alone in the law's approach to maternal-fetal conflict. The general trend has been to protect fetal interest, particularly when a live-birth results or is expected." Fost, *Maternal-fetal conflicts: Ethical and Legal Considerations*, 562 Ann. N.Y. Acad. Sci. 248, 250 (1989).

[45] Beauchamp & McCullough, *Medical Ethics: The Moral Responsibilities of Physicians* 27 (1984).

[46] *Id.* at 22.

in refusing a self-saving blood transfusion may override the physician's duty to save the patient's life. However, when a pregnant woman requires a blood transfusion and both mother and fetus would die without the treatment, the physician's beneficence duty may override the mother's autonomy.

Elective abortion brings the beneficence and autonomy principles into violent collision. The two principles cannot both be adhered to fully in the abortion context. Either the physician will choose to act consistent with traditional medical ethics and beneficence or he will defer to the autonomy model and carry out the woman's desires, at the expense of the life of the unborn child.

Certain *amici* readily concede that there are two models of informed consent doctrine—an "autonomy" model and a "therapeutic" or beneficence model—and they note that the autonomy model was first adopted in a 1960 state court decision. *Natanson v. Kline*, 186 Kan. 393, 350 P.2d 1093 (1960). Petitioners are asking that this Court incorporate one of these models—the autonomy model—into the First Amendment through *Roe v. Wade* and raise it to constitutional status in order to strike down these regulations. It is clear that Petitioners' model, particularly in the abortion context, is not "deeply rooted in this Nation's history and tradition" and no other rationale is given as to why this model should suddenly be explicitly imposed on the country as part of the First Amendment. *Cf. Webster; Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).[47]

The principle of beneficence, however, has been integral to medical ethics since the Hippocratic Oath. In its refusal to provide abortion counseling and referral in its pre-pregnancy family planning, the Government is con-

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[47] For a fuller refutation of the First Amendment challenge, *see Brief of the American Academy of Medical Ethics as Amicus Curiae in Support of Respondent.*

sistent with centuries of medical practice and ethics. To embrace Petitioners' argument would require this Court to expand *Roe* in an unwarranted fashion deleterious to American medicine, to the health of pregnant women and their children, and to the Government's well-established right to advance its policies through allocation of its resources.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

Of Counsel

KENT MASTERSON BROWN
1114 First National Blg.
167 West Main Street
Lexington, KY 40507
(606) 233-7879

CLARKE D. FORSYTHE *
KEVIN J. TODD
AMERICANS UNITED FOR LIFE
LEGAL DEFENSE FUND (AUL)
343 S. Dearborn Street
Suite 1804
Chicago, IL 60604
(312) 786-9494
Counsel for Amicus Curiae **

* Counsel of Record

September 7, 1990

** Counsel for *Amicus Curiae* would like to acknowledge the significant research assistance of Peter Poon (J.D., Berkeley, 1992) in the preparation of this Brief.

APPENDICES

APPENDIX A

42 C.F.R. § 59.1-59.10 (1989)

Part 59—GRANTS FOR FAMILY PLANNING SERVICES

* * * *

SUBPART A—PROJECT GRANTS FOR FAMILY PLANNING SERVICES

Sec. 59.1 To what programs do these regulations apply?

The regulations of this subpart are applicable to the award of grants under section 1001 of the Public Health Service Act (42 U.S.C. 300) to assist in the establishment and operation of voluntary family planning projects. These projects shall consist of the educational, comprehensive medical, and social services necessary to aid individuals to determine freely the number and spacing of their children.

Sec. 59.2 Definitions.

As used in this subpart:

"Act" means a social unit composed of one person, or two or more persons living together, as a household.

"Family" means a social unit composed of one person, or two or more persons living together, as a household.

"Family planning" means the process of establishing objectives for the number and spacing of one's children and selecting the means by which those objectives may be achieved. These means include a broad range of acceptable and effective methods and services to limit or enhance fertility, including contraceptive methods (including natural family planning and abstinence) and the management of infertility (including adoption). Family planning services includes preconceptional counseling, education, and general reproductive health care (includ-

ing diagnosis and treatment of infections which threaten reproductive capability). Family planning does not include pregnancy care (including obstetric or prenatal care). As required by section 1008 of the Act, abortion may not be included as a method of family planning in the Title X project. Family planning, as supported under this subpart, should reduce the incidence of abortion.

"Grantee" means the organization to which a grant is awarded under section 1001 of the Act.

"Low-income family" means a family whose total annual income does not exceed 100 percent of the most recent Community Services Administration Income Poverty Guidelines (45 CFR 1060.2). "Low-income family" also includes members of families whose annual family income exceeds this amount, but who, as determined by the Title X project director, are unable, for good reasons, to pay for family planning services. For example, unemancipated minors who wish to receive services on a confidential basis must be considered on the basis of their own resources.

"Nonprofit," as applied to any private agency, institution, or organization, means that no part of the entity's net earnings benefit, or may lawfully benefit, any private shareholder or individual.

"Prenatal care" means medical services provided to a pregnant woman to promote maternal and fetal health.

"Program" and "project" are used interchangeably and mean a coherent assembly of plans, activities and supporting resources contained within an administrative framework.

"Secretary" means the Secretary of Health and Human Services and any other officer or employee of the Department of Health and Human Services to whom the authority involved has been delegated.

"State" means one of the 50 States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa, Northern Marianas, or the Trust Territory of the Pacific Islands.

"Title X" means Title X of the Act, 42 U.S.C., 300, et seq.

"Title X program" and Title X project" are used interchangeably and mean the identified program which is approved by the Secretary for support under section 1001 of the Act, as the context may require. Title X project funds include all funds allocated to the Title X program, including but not limited to grant funds, grant-related income or matching funds.

Sec. 59.3 Who is eligible to apply for a family planning services grant?

Any public or nonprofit private entity in a State may apply for a grant under this subpart.

Sec. 59.4 How does one apply for a family planning services grant?

(a) Application for a grant under this subpart shall be made on an authorized form.

(b) An individual authorized to act for the applicant and to assume on behalf of the applicant the obligations imposed by the terms and conditions of the grant, including the regulations of this subpart, must sign the application.

(c) The application shall contain—

(1) A description satisfactory to the Secretary, of the project and how it will meet the requirements of this subpart;

(2) A budget and justification of the amount of grant funds requested;

(3) A description of the standards and qualifications which will be required for all personnel and for all facilities to be used by the project; and

(4) Such other pertinent information as the Secretary may require.

Sec. 59.5 What requirements must be met by a family planning project?

(a) Each project supported under this part must:

(1) Provide a broad range of acceptable and effective medically approved family planning methods (including natural family planning methods) and services (including infertility services and services for adolescents). If an organization offers only a single method of family planning, such as natural family planning, it may participate as part of a Title X project as long as the entire Title X project offers a broad range of family planning services.

2) Provide services without subjecting individuals to any coercion to accept services or to employ or not to employ any particular methods of family planning. Acceptance of services must be solely on a voluntary basis and may not be made a prerequisite to eligibility for, or receipt of, any other services, assistance from or participation in any other program of the applicant.

(3) Provide services in a manner which protects the dignity of the individual.

(4) Provide services without regard to religion, race, color, national origin, handicapping condition, age, sex, number of pregnancies, or marital status.

(5) Provide that priority in the provision of services will be given to persons from low-income families.

(6) Provide that no charge will be made for services provided to any person from a low-income family except to the extent that payment will be made by a third party (including a Government agency) which is authorized to or is under legal obligation to pay this charge.

(7) Provide that charges will be made for services to persons other than those from low-income families in accordance with a schedule of discounts based on ability to pay, except that charges to persons from families whose annual income exceeds 250 percent of the levels set forth in the most recent CSA Income Poverty Guidelines (45 CFR 1060.2) will be made in accordance with a schedule of fees designed to recover the reasonable cost of providing services.

(8) If a third party (including a Government agency) is authorized or legally obligated to pay for services, all reasonable efforts must be made to obtain the third-party payment without application of any discounts. Where the cost of services is to be reimbursed under title XIX or title XX of the Social Security Act, a written agreement with the title XIX or title XX agency is required.

(9) (i) Provide that if an application relates to consolidation of service areas or health resources or would otherwise affect the operations of local or regional entities, the applicant must document that these entities have been given, to the maximum feasible extent, an opportunity to participate in the development of the application. Local and regional entities include existing or potential subgrantees which have previously provided or propose to provide family planning services to the area proposed to be served by the applicant.

(ii) Provide an opportunity for maximum participation by existing or potential sub-

grantees in the ongoing policy decisionmaking of the project.

(10) Provide for an Advisory Committee as required by Sec. 59.6.

(b) In addition to the requirements of paragraph (a) of this section, each Title X project must meet each of the following requirements unless the Secretary determines that the Title X project has established good cause for its omission. Each Title X project must:

(1) Provide for medical services related to family planning (including physician's consultation, examination prescription, and continuing supervision, laboratory examination, contraceptive supplies) and necessary referral to other medical facilities when medically indicated, and provide for the effective usage of contraceptive devices and practices.

(2) Provide for social services related to family planning, including counseling, referral to and from other social and medical service agencies, and any ancillary services which may be necessary to facilitate clinic attendance.

(3) Provide for informational and educational programs designed to (i) achieve community understanding of the objectives of the Title X program, (ii) inform the community of the availability of services, and (iii) promote continued participation in the Title X project by persons to whom family planning services may be beneficial.

(4) Provide for orientation and in-service training for all Title X project personnel.

(5) Provide services without the imposition of any durational residency requirement or requirement that the patient be referred by the physician.

(6) Provide that family planning medical services will be performed under the direction of a physician

with special training or experience in family planning.

(7) Provide that all services purchased for the Title X project participants will be authorized by the Title X project director or his designee on the Title X project staff.

(8) Provide for coordination and use of referral arrangements with other providers of health care services, local health and welfare departments, hospitals, voluntary agencies, and health services projects supported by other Federal programs.

(9) Provide that if family planning services are provided by contract or other similar arrangements with actual providers of services will be provided in accordance with a plan which establishes rates and methods of payment for medical care. These payments must be made under agreements with a schedule of rates and payment procedures maintained by the grantee. The grantee must be prepared to substantiate that these rates are reasonable and necessary.

(10) Provide, to the maximum feasible extent, an opportunity for participation in the development, implementation, and evaluation of the Title X project by persons broadly representative of all significant elements of the population to be served, and by others in the community knowledgeable about the community's needs for family planning services.

Sec. 59.6 [Omitted]

Sec. 59.7 Standards of compliance with prohibition on abortion.

A project may not receive funds under this subpart unless it provides assurance satisfactory to the Secretary that it does not include abortion as a method of

family planning. Such assurance must include, as a minimum, representations (supported by such documentation as the Secretary may request) as to compliance with each of the requirements in Sec. 59.8 through Sec. 59.10. A project must comply with such requirements at all times during the period for which support under Title X is provided.

Sec. 59.8 Prohibition on counseling and referral for abortion services; limitation of program services to family planning.

(a) (1) A Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.

(2) Because Title X funds are intended only for family planning, once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child. She must also be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept. In cases in which emergency care is required, however, the Title X project shall be required only to refer the client immediately to an appropriate provider of emergency medical services.

(3) A Title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abortion, by excluding available providers who do not

provide abortions, or by "steering" clients to providers who offer abortion as a method of family planning.

(4) Nothing in this subpart shall be construed as prohibiting the provision of information to a project client which is medically necessary to assess the risks and benefits of different methods of contraception in the course of selecting a method; provided, that the provision of this information does not include counseling with respect to or otherwise promote abortion as a method of family planning.

(b) Examples.

(1) A pregnant client of a Title X project requests prenatal care services, which project personnel are qualified to provide. Because the provision of such services is outside the scope of family planning supported by Title X, the client must be referred to appropriate providers of prenatal care.

(2) A Title X project discovers an ectopic pregnancy in the course of conducting a physical examination of a client. Referral arrangements for emergency medical care are immediately provided. Such action is in compliance with the requirements of paragraph (a) (2) of this section.

(3) A pregnant woman asks the Title X project to provide her with a list of abortion providers in the area. The Title X project tells her that it does not refer for abortion but provides her a list which includes, among other health care providers, a local clinic which principally provides abortions. Inclusion of the clinic on the list is inconsistent with paragraph (a) (3) of this section.

(4) A pregnant woman asks the Title X project to provide her with a list of abortion providers in the area. The project tells her that it does not refer

for abortion and provides her a list which consists of hospitals and clinics and other providers which provide prenatal care and also provide abortions. None of the entries on the list are providers that principally provide abortions. Although there are several appropriate providers of prenatal care in the area which do not provide or refer for abortions, none of these providers are included on the list. Provision of the list is inconsistent with paragraph (a)(3) of this section.

(5) A pregnant woman requests information on abortion and asks the Title X project to refer her to an abortion provider. The project counselor tells her that the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion. The counselor further tells the client that the project can help her to obtain prenatal care and necessary social services, and provides her with a list of such providers from which the client may choose. Such actions are consistent with paragraph (a) of this section.

(6) Title X project staff provide contraceptive counseling to a client in order to assist her in selecting a contraceptive method. In discussing oral contraceptives, the project counselor provides the client with information contained in the patient package insert accompanying a brand of oral contraceptives, referring to abortion only in the context of a discussion of the relative safety of various contraceptive methods and in no way promoting abortion as a method of family planning. The provisions of this information does not constitute abortion counseling or referral.

Sec. 59.9 Maintenance of program integrity.

A Title X project must be organized so that it is physically and financially separate, as determined in

accordance with the review established in this section, from activities which are prohibited under section 1008 of the Act and Sec. 59.8 and Sec. 59.10 of these regulations from inclusion in the Title X program. In order to be physically and financially separate, a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient. The Secretary will determine whether such objective integrity and independence exist based on a review of facts and circumstances. Factors relevant to this determination shall include (but are not limited to):

(a) The existence of separate accounting records;

(b) The degree of separation from facilities (e.g., treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities;

(c) The existence of separate personnel;

(d) The extent to which signs and other forms of identification of the Title X project are present and signs and material promoting abortion are absent.

Sec. 59.10 Prohibition on activities that encourage, promote or advocate abortion.

(a) A Title X project may not encourage, promote or advocate abortion as a method of family planning. This requirement prohibits actions to assist women to obtain abortions or increase the availability or accessibility of abortion for family planning purposes. Prohibited actions include the use of Title X project funds for the following:

(1) Lobbying for the passage of legislation to increase in any way the availability of abortion as a method of family planning;

(2) Providing speakers to promote the use of abortion as a method of family planning;

(3) Paying dues to any group that as a significant part of its activities advocates abortion as a method of family planning;

(4) Using legal action to make abortion available in any way as a method of family planning; and

(5) Developing or disseminating in any way materials (including printed matter and audiovisual materials) advocating abortion as a method of family planning.

(b) Examples.

(1) Clients at the Title X project are given brochures advertising an abortion clinic. The Title X project has violated paragraph (a) of this section.

(2) A Title X project makes an appointment for a pregnant client with an abortion clinic. The Title X project has violated paragraph (a) of this section.

(3) A Title X project pays dues to a state association which, among other activities, lobbies at state and local levels for the passage of legislation to protect and expand the legal availability of abortion as a method of family planning. The association spends a significant amount of its annual budget on such activity. Payment of dues to the association violates paragraph (a)(3) of this section.

(4) An organization conducts a number of activities, including operating a Title X project. The organization uses non-project funds to pay dues to an association which, among other activities, engages in lobbying to protect and expand the legal availability of abortion as a method of family planning. The association spends a significant amount of its annual budget on such activity. Payment of dues to the association by the organization does not violate paragraph (a)(3) of this section.

(5) An organization that operates a Title X project engages in lobbying to increase the legal availability of abortion as a method of family planning. The project itself engages in no such activities and the facilities and funds of the project are kept separate from prohibited activities. The project is not in violation of paragraph (a)(1) of this section.

(6) Employees of a Title X project write their legislative representatives in support of legislation seeking to expand the legal availability of abortion, using no project funds to do so. The Title X project has not violated paragraph (a)(1) of this section.

(7) On her own time and at her own expense, a Title X project employee speaks before a legislative body in support of abortion as a method of family planning. The Title X project has not violated paragraph (a) of this section.

Sec. 59.11 [Omitted]

Sec. 59.12 [Omitted]

Sec. 59.13 [Omitted]

Sec. 59.14 [Omitted]

Sec. 59.15 [Omitted]

Sec. 59.16 [Omitted]

Sec. 59.17 [Omitted]

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 88-0701, 88-0702
Judge Louis L. Stanton

STATE OF NEW YORK, *et al.*,
Plaintiffs,

IRVING RUST, *et al.*,
Plaintiffs,

v.

OTIS R. BOWEN,
Defendant.

AFFIDAVIT OF RICHARD T. F. SCHMIDT, M.D., FACOG

Affiant states as follows:

1. I am Richard T. F. Schmidt, M.D., a Fellow of the American College of Obstetricians and Gynecologists, clinical Professor of Obstetrics/Gynecology at the University of Cincinnati, and Director Emeritus of the Department of Obstetrics/Gynecology, Good Samaritan Hospital, a university-affiliated hospital which provides the largest maternity service in the State of Ohio, a Level III high risk perinatal unit and, among other allied services, a Teen Parent program, which I initially founded with the aid of federal funds.

2. For over 35 years, I have been actively involved in the clinical practice of obstetrics and gynecology and

over a major portion of this time, have held a variety of national policy-making positions. I served as President of the American College of Obstetricians and Gynecologists (ACOG) (1977-78), after a six-year term on its Executive Board and Executive Committee. I edited a previous edition of the College's definitive policy publication, *Standards for Obstetric-Gynecologic Services.* I served on the College's Health Care Commission and, among many committee assignments, served on its Committee on Bioethics.

3. In recent years, I have served two terms on the Council on Scientific Affairs of the American Medical Association (AMA). I am currently a member of the Steering Committee of the Health Policy Agenda for the American People and chaired one of the six working groups (Work Group 1, Medical Science) which prepared the material that ultimately constituted the report of this three-year effort which brought together a broad cross-section of the public and private agencies and organizations concerned with the funding and delivery of health care throughout the nation.

4. I submit this statement in *support* of the new rules (53 Fed. Reg. 2922 (February 2, 1988)) because of the considered judgment that:

(1) a change in rule is necessary if the obvious intent of Congress to separate the promotion and provision of abortion services from the public funding of family planning programs is to be fulfilled;

(2) the changes are fully compatible with the real-world operation of family planning programs, as opposed to the provision of abortion services;

(3) the change will not impair, or even significantly alter, the provision of family planning or prenatal services as differentiated from the promotion or provision of abortion services.

5. The need for a change in rule has been repeatedly demonstrated to me first hand by both private patients and patients in the Teen Parent program which we founded to meet the needs of those young pregnant women who did not choose abortion. The story was so common that it was almost routine: When a pregnancy was diagnosed in some Title X programs it was presumed that because the patient wanted to avoid pregnancy she would necessarily and appropriately wish to avoid childbirth and therefore *should* want to be aborted. Alternatives to abortion were either not offered spontaneously or were presented in such a way as to convey the message that such alternatives were not very good judgment. Repeatedly, patients described an uphill struggle to get help in their dilemma that did not presume abortion as the only reasonable solution. My own conclusion was not so much that the counselors were overtly limiting the patients' choices, but rather that their own judgments were being transferred, consciously or unconsciously, to the patient. For this reason, I believe that objective guidelines to avoid this conscious or unconscious bias toward abortion are necessary to fulfill the intent of Congress.

6. I am unaware of the allegation that the change in rule will seriously impair the delivery of *prenatal* care. It should be emphasized that family planning clinics do not normally provide prenatal care even though a family planning clinic may be associated with, or housed in the same facility as, a prenatal clinic. The normal procedure is to *refer* those patients requiring or desiring prenatal care to a prenatal clinic which is staffed or equipped for such care. The obvious reason is that the need for these functions are quite different. The volume and flow of patients in the average family planning clinic is such that a great portion of this service can appropriately be supplied by allied health care people under the supervision of a physician. Prenatal care, however, particularly when it involves medical judgment, requires

more time per patient and a substantially larger and more immediate component of physician involvement. As I read the new rule, it simply requires what is already being done, except that such referral be made in a non-judgmental way.

7. I am also aware that it is asserted that the new rule would prevent the physician from providing full information to the patient regarding her options. I would ask "Full information about what?" The issue is the provision of family planning services. Had Congress, in this specific law, intended to fund a full range of perinatal services, including prenatal care and abortion, I am sure that it would have said so. In fact, it specifically excluded other such services. The only contexts in which this assertion would be valid would be the belief that abortion is an appropriate part of family planning; or, that prenatal services including abortion are inseparable from family planning. Were this latter position held, it would seem that either Congress would have to reword the law or the holders of this position would have to forego these Title X funds.

8. As a matter of practical fact, as I have pointed out above, the separation of family planning from other perinatal services is normally and customarily made for very mundane and practical reasons.

9. Moreover, I would suggest that if complicated medical issues are involved, such as the management of the pregnant woman seropositive for AIDS, to cite one example proposed, then this counseling and decisionmaking should appropriately take place in a perinatal clinic or facility organized, equipped, and staffed for a full range of diagnostic and treatment services rather than in the faster-paced, more focused atmosphere of the family planning clinic.

10. For these reasons, I believe that the change in rule is not only warranted but fully compatible with the effective operation of family planning facilities.

FURTHER AFFIANT SAITH NOT.

Richard T.F. Schmidt
RICHARD T.F. SCHMIDT, M.D.
FACOG

Subscribed and Sworn to before me
this — day of February, 1988.

_____

Notary Public

APPENDIX C

STATE INFORMED CONSENT STATUTES

Alaska Stat. 09.55.556 (1989); Ariz. Rev. Stat. Ann. 12-563 (1982); Ark. Stat. Ann. 16-114-206 (1987); Cal. Penal Code 2670.5-2674 (West 1982) (prisoners' right to give informed consent to organic therapy); Colo. Rev. Stat. 13-20-401, -402 (1987) (written informed consent needed for electro-convulsive treatments); Del. Code Ann. tit. 18, 6852 (1989); Fla. Stat. Ann. 766.103 (West Supp. 1990); Ga. Code Ann. 31-9-6.1 (1985); Haw. Rev. Stat. 671-3 (1985); Idaho Code 39-4301-4306 (1985); Iowa Code Ann. 147.137 (West 1989); Ky. Rev. Stat. Ann. 304.40-.320 (Baldwin (1987); La. Rev. Stat. Ann. 40:1299.40 (West 1977); Me. Rev. Stat. Ann. tit. 24, 2905 (Supp. 1989-90); Mass. Gen. Laws Ann. ch. 111, 70E (West 1983) (health care patients "have the right . . . to informed consent to the extent provided by law"); Mich. Comp. Laws Ann. 33.20201 (West 1980) (health care patients' right to give informed consent to treatment); Minn. Stat. Ann. 144.651 (West 1989) (health care patients' right to give informed consent to treatment); Mo. Ann. Stat. 198.088 (Vernon 1983) (nursing home patients' right to give informed consent to experimental treatment); Neb. Rev. Stat. 44-2816 (1988); Nev. Rev. Stat. 41A.110 (1987); Nev. Rev. Stat. 449.710 (health care patients' right to give informed consent to treatment) (1987); N.H. Rev. Stat. Ann. 507-C:1, -C:2 (1989); N.Y. Pub. Health Law 2805-d (McKinney 1985); N.Y. Pub. Health Law 2440-2446 (McKinney 1985) (right to give informed consent to exprimental treatment); N.C. Gen. Stat. 90-21.13 (1985); Ohio Rev. Code Ann. 2317.54 (Anderson 1981); Or. Rev. Stat. 677.097 (1989); Or. Rev. Stat. 441.605 (1989) (nursing home patients' right to give informed consent to treatment); Pa. Cons. Stat. Ann. tit. 40, 1301.103 (Purdon Supp. 1990-91); Tenn. Code Ann. 29-26-118 (1980); Tex.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DR. IRVING RUST, M.D., *et al.*,
Petitioners,

v.

LOUIS W. SULLIVAN,
Secretary of Health and Human Services,
Respondent.

THE STATE OF NEW YORK, *et al.*,
Petitioners,

v.

LOUIS W. SULLIVAN,
Secretary of Health and Human Services,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF FEMINISTS FOR LIFE OF AMERICA AND AMERICAN ASSOCIATION OF PROLIFE OBSTETRICIANS AND GYNECOLOGISTS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Of Counsel:
LEANNE E. McCOY
AUL LEGAL DEFENSE FUND
848 S. Dearborn Street
Suite 1804
Chicago, Illinois 60604
(312) 786-9494

EDWARD R. GRANT
(Counsel of Record)
222 No. LaSalle Street #300
Chicago, Illinois 60601
(312) 704-3000
Attorney for Amici Curiae

September 7, 1990

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BRIEF OF FEMINISTS FOR LIFE OF AMERICA AND AMERICAN ASSOCIATION OF PROLIFE OBSTETRICIANS AND GYNECOLOGISTS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI

Feminists of Life of America ("FFLA") has its national headquarters in Kansas City, Missouri and state chapters throughout the nation. FFLA engages in educational activities, lobbying and advocacy designed to foster respect for human life and social and economic justice for women. FFLA recognizes that much of the support for abortion on demand as a "solution" for crisis pregnancies stems from motives that are far removed from women's welfare, and that this reality is demonstrated in the abusive practices that have flourished at abortion clinics since the legalization of abortion in 1973. Moreover, FFLA members believe that the widespread availability of abortion provides a disincentive to responsible sexual behavior and use of preconception family planning.

The American Association of Prolife Obstetricians and Gynecologists (AAPLOG) is a national organization of obstetricians and gynecologists founded in 1973 and dedicated to reaffirming the unique value and dignity of individual human life in all stages from the moment of conception. The organization is engaged in educational and research projects which enhance the goals of the organization. AAPLOG has particular concerns regarding the impact on maternal health of abortion on demand, and the prevalent use of abortion as a means of family planning or birth control. AAPLOG believes that lax enforcement of Title X's restriction upon the use of abortion as a method of family planning has allowed abortion to become a component of the largest government-supported family planning program, further eroding public respect for human life, and advancing the notion that abortion is an acceptable means of family planning.

STATEMENT

Title X of the Public Health Service Act was enacted in 1970 to provide federal support for preventive family planning services. Section 1008 of Title X expressly prohibited the expenditure of Title X funds in any program where abortion is a method of family planning. 42 U.S.C. § 300a-6.

The Office of Population Affairs of the Department of Health and Human Services proposed regulations in 1987 to enforce the specific mandate of Section 1008. These were the first HHS regulations directed to this issue. Department policy toward Section 1008 had previously been expressed through internal memoranda, and a series of Guidelines published in 1981.

The final regulations were issued in February, 1988. 53 Fed. Reg. 2944, 2946 (1988), 42 C.F.R. §§ 59.2, 59.7, 59.8, 59.9, 59.10 (hereinafter referred to as "new Regulations"). The new Regulations, among other things, require Title X clinics to refer their pregnant clients to appropriate prenatal and social services that promote the welfare of the mother and unborn child. Such referrals cannot be used to steer women to providers whose principal business is performing abortions. Where a medical emergency relating to pregnancy exists, the client is to be referred immediately to a provider of emergency care. 42 C.F.R. § 59.8.

To maintain the integrity of the Title X program, the new Regulations also require that the program be organized so that it is physically and financially separate from activities which are prohibited by Section 1008 and related regulations. 42 C.F.R. § 59.9. In addition, Title X program funds may not be used for political, lobbying and advocacy activities relating to abortion. 42 C.F.R. § 59.10. The foregoing requirements apply to an entire Title X program, and not merely to the portion of funding of that program which is contributed by the federal government. 42 C.F.R. § 59.2.

SUMMARY OF ARGUMENT

Section 1008 of Title X broadly prohibits the expenditure of Title X funds in programs where abortion is a method of family planning. Since the nationwide legalization of abortion, *Roe v. Wade*, 410 U.S. 113 (1973), the need for vigilant enforcement of Section 1008 has grown. Abortion is widely advocated and employed as a method of family planning, as illustrated by the fact that almost 43 percent of abortions are performed upon women who have previously had at least one abortion.

Previous policies and guidelines regarding compliance with Sec. 1008 have been inadequate. Thus, Title X clinics have been permitted to share facilities with abortion clinics, and to engage in counseling and referral practices which a 1982 report of the Comptroller General concluded were "questionable" in light of Section 1008. Furtherfore, the requirement imposed by HHS in 1981 that Title X clinics engage in "options counseling" of their pregnant clients has effectively permitted such clinics to incorporate abortion as a means of family planning into the counseling and referral component of their services. The training literature and counseling practices of such clinics affirmatively treat abortion as a family planning option, and even state that this option must be discussed with clients who are not even pregnant. Furthermore, training materials propose counseling strategies which encourage women who are ambivalent about a decision to abort to go ahead with that decision.

The new Regulations are thus essential to preserve the strict dichotomy that Congress intended to exist between Title X programs on the one hand, and abortion on the other. These regulations do not pose any risk to maternal or child health. Elective abortions, chosen as a means of family planning or birth control, constitute over 95 percent of abortions performed annually. The abortion destroys the life of the unborn child, and poses risks of both physical and psychological harm to the mother—

risks which were not required to be disclosed under the former "options counseling" Guidelines. Thus, by prohibiting referral to facilities whose primary purpose is the performance of elective abortions, the new Regulations protect, rather than harm, maternal and fetal health interests.

Furthermore, in those cases where a medical indication for abortion does exist, appropriate diagnosis, care and counseling can only be performed by an expert in the woman's underlying medical condition. Neither Title X clinics, nor clinics specializing in abortion services, are equipped to offer such expertise. Thus, when a client of a Title X clinic is diagnosed as pregnant, and she suffers from a condition that could complicate the pregnancy, the clinic should immediately refer her to a specialist in that condition. The new Regulations clearly permit this course of action.

Because of the specific nature of the amici's interests in this case, their argument is directed to Sections 59.2, 59.7, 59.8, and 59.9 of the Regulations. The amici, however, support all of the challenged regulations, in their entirety.

ARGUMENT

I. SINCE ABORTION IS COMMONLY EMPLOYED AS A METHOD OF FAMILY PLANNING, AND HAS BEEN SO EMPLOYED BY MANY PROGRAMS RECEIVING TITLE X FUNDING, THE NEW TITLE X REGULATIONS ARE ESSENTIAL TO ENFORCE THE STATUTORY PROHIBITION ON FUNDING ABORTION AS A MEANS OF FAMILY PLANNING.

A. Section 1008 is a Broad Prohibition of Funding of Any Program In Which Abortion Is a Method of Family Planning.

In 1970, when Title X of the Public Health Service Act [1] was first enacted, abortion was advocated,[2] but was

[1] 42 U.S.C. § 300 *et seq.* (1982).

[2] The Senate debate on Title X records statements of several national organizations which candidly endorsed abortion as a means of family planning. 116 Cong. Rec. 24097-24101 (July 14, 1970) (statement of Sen. Packwood). Legal abortion was encouraged: "to assure the accepted right to determine freely the number and spacing of . . . children" (American Public Health Association); "as a back-up medical technique to omitted or failed contraception" (Planned Parenthood); and to protect a woman's "right to decide whether to terminate a particular pregnancy she does not wish to carry to term" (Citizen's Advisory Council on the Status of Women). *Id.* at 24097-24098.

not widely available or utilized as a means of family planning.[3] The framers of Title X recognized the potential that a nationwide, comprehensive program of family planning services could, without specific limitation, endorse abortion as a means of family planning.[4] The

[3] Despite some claims in the record of this case to contrary, *Cf.* Katz Affidavit, ¶ 12, J.A. 205, 209, abortion was not widely available at the time, being prohibited or greatly restricted in 46 states. *See,* Linton, *Enforcement of State Abortion Laws After* Roe: *A State-by-State Analysis,* 67 U. Det. L. Rev. 157 (1990) (analyzing laws in effect as of January 22, 1973). Thirty states allowed abortion only to save the life of the mother; two states and the District of Columbia allowed abortion only to preserve the life or health of the mother; one state allowed abortion to save the life of the mother or to terminate a pregnancy resulting from rape, and thirteen states allowed abortion to save the life or physical or mental health of the mother, to terminate a pregnancy resulting from rape or incest, or to terminate a pregnancy when the unborn child may be severely mentally or physically disabled. *Id.* at 162-236, 258.

The remarks of Representative Dingell, in support of Section 1008, stated that "[n]one of the 50 states currently sanction abortion as a method of family planning." 116 Cong. Rec. 37379 (1970) (statement of Rep. Dingell). The uniformity of legal opposition to abortion at the time prompted him to note that "[f]or the Congress of the United States to appropriate funds for a procedure which would violate the criminal law of a vast majority of American jurisdictions would be to raise constitutional questions of a most serious nature." *Id.*

[4] 116 Cong. Rec. at 37371 (Nov. 16, 1970) (statement of Rep. Pickle) ("Given the urgency of the population problem, the temptation to use scare tactics and to trammel on the beliefs of others is easy to see."); 116 Cong. Rec. at 37368 (Nov. 16, 1970) (statement of Rep. Carter); 116 Cong. Rec. at 37375 (Nov. 16, 1970) (statement of Rep. Broyhill).

House version of Title X thus included a provision "making it clear that no funds appropriated under the legislation may be used in programs where abortion is a method of family planning." [5] This provision was eventually agreed upon by the House-Senate conferees, and enacted as Section 1008 of Title X.[6]

Consistent with the intent of Title X to provide omnibus *family planning* services,[7] Section 1008 is phrased broadly. It should likewise be applied broadly, to *any* aspect of any program funded by Title X. From its outset, Title X was multi-faceted, involving financial support for direct family planning services, training of family planning specialists, and research into the biology of human reproduction, the development of contraceptives, and the social and behavioral aspects of population.[8] Thus, the drafters contemplated that Title X "programs" would include more than simply the prescription of contraceptive drugs and devices, or the performance of medical procedures.[9] Indeed, some funded programs, including those involving education and research, might not engage in these functions at all.

[5] Family Planning Services and Population Research Act of 1970, H. Rep. 91-1472, *reprinted in* 91 U.S. Code, Cong. & Admin. News 5068, 5070 (1970) ("House Report").

[6] 42 U.S.C. § 300a-6.

[7] The arguments of Petitioners and several *amici* suggest that Title X was enacted to provide comprehensive *health care* services to women. The legislative history of Title X is devoid of any such suggestion. The House and Senate floor debates indicate that Title X was enacted to meet two perceived needs: first, the social need for research, education and funding on issues of human reproduction and population; and second, the need for families, particularly the poor, to have access to voluntary family planning services. *See generally*, 116 Cong. Rec. 24089-24101 (Senate); 116 Cong. Rec. 37375-37393 (House).

[8] House Report, *supra* note 5 at 5070-5071.

[9] S. Rep. No. 91-1004, 91st Cong., 2d Sess. 10 (1970) *reprinted in* 116 Cong. Rec. 24094, 24096 (1970) ("Senate Report") (Title X program should include "medical services, including consultation, examination, prescription and continuing supervision, supplies, instruction and referral to other medical services as needed . . . [an] outreach/follow-up system, including patient identification, contact, recruitment, appointment support, follow-up, and continuing education.")

Accordingly, the Congressional mandate that no Title X funds "shall be used in *programs* where abortion is a method of family planing," cannot be read simply to prohibit the performance of abortions in funded programs. Rather, this prohibition must extend to all aspects of a Title X program. Clearly, where an entity operating a Title X clinic shares its facilities with an abortion clinic, or uses its own personnel to perform abortions when the Title X program is purportedly "closed," the strictures of Section 1008 are violated.[10] This is also true if the clinic counsels that elective abortion is a back-up to contraceptive failure, or routinely refers its clients to clinics which are primarily or exclusively engaged in performing abortions. In each of these scenarios, abortion is treated as a method of family planning.

Section 1008 would be a hollow prohibition if a clinic could escape its grasp by excluding abortion from its range of medical services, while including abortion as a part of its referral and counseling services. Since Congress clearly recognized the breadth of the word "program" as used in Section 1008, and prohibited the funding of "programs" where abortion is a method of family planning, appropriate enforcement of Section 1008 would require the Secretary to look at *all* aspects of a program—not just its direct delivery of medical services—in making the determination of compliance with Section 1008. The regulations at issue are consistent with this requirement.

[10] Comptroller General of the United States, *Restrictions on Abortion and Lobbying Activities in Family Planning Programs Need Clarification*, General Accounting Office, Report No. GAO/HRD-82-106 (1982), at 7-10, J.A. 82, 100-103 (Hereinafter cited as "Report").

B. Abortion Is Widely Used As a Method of Family Planning.

Contrary to the situation prevailing in 1970, abortion is now legal, virtually throughout pregnancy, in all 50 states. As a result, it is commonly used, even on a repeat basis, as a means of family planning.

Abortion is the most commonly performed surgical procedure in the United States. One and one-half million abortions are performed each year, a preponderance of these at the approximately 820 freestanding clinics devoted primarily to this purpose.[11] Despite widespread confusion over the "medical" aspects of abortion, the fact is that over ninety-five percent of abortions are performed because the mother has determined, for non-medical reasons, that she does not want to be pregnant and/or to bear a child at that particular time.[12]

The use of abortion as a means of family planning has dramatically increased since the nationwide legalization of abortion. *Roe v. Wade*, 410 U.S. 113 (1973).[13] This

[11] Torres & Forrest, *Why Do Women Have Abortions?*, 20 Fam. Plan. Persp. 169, 169 (1988) (90 percent of abortions are performed at 819 clinics which each perform at least 400 abortions per year.)

[12] "[T]wo percent of all abortions in this country are done for some clinically identifiable entity—physical health problem, amniocentesis, and identified genetic disease or something of that kind." The remainder are elective, "performed on women who for various reasons do not wish to be pregnant at this time." *Constitutional Amendments Relating to Abortion: Hearings on S.J. Res. 17, S.J. Res. 18, S.J. Res. 19, and S.J. Res. 110 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 97th Cong. 1st Sess. 158 (statement of Irwin M. Cushner, M.D., M.P.H.) *See also*, Torres & Forrest, *supra* note 11 at 170 (Of 1773 abortion patients surveyed, three percent cited maternal health considerations as most important factor for choosing abortion; one percent cited rape or incest.)

[13] *See* Wardle, *"Time Enough"*: Webster v. Reproductive Health Services *and the Prudent Pace of Justice*, 41 Fla.L.Rev. 881, 955, 985-986 (1989).

is illustrated by increases in both the abortion rate, and in the number of repeat abortions. For example, in 1974, approximately 899,000 abortions were performed in the United States, representing a rate of 19.3 per 1000 women of childbearing age.[14] Of these, 15.2 percent were upon women receiving at least their second abortion.[15] By 1985, approximately 1.6 million abortions were performed, and the rate had climbed to 28.0 per 1000 women of childbearing age.[16] More significantly, 42.9 percent of abortions performed in 1987 were upon women receiving at least their second abortion.[17] The rise in these figures has been consistent since the legalization of abortion in 1973.[18]

The vast preponderance of abortions are not performed for medical reasons, but due to factors exogenous to the pregnancy itself, such as the woman's age, socio-economic standing, family circumstances, and access to financial and family support for child-bearing and child-rearing.[19] These are precisely the circumstances which influence other "family-planning" decisions. For this reason, those entities and individuals who consider abortion to be a morally-neutral or even beneficial form of family planning now include abortion or abortion referrals among the range of family planning services that they offer. Indeed, the central thrust of Petitioners' arguments in this case is that abortion is a family planning option for a woman with an unplanned pregnancy.

[14] Henshaw, *et al., Abortion Services in the United States, 1979 and 1980*, 14 Fam. Plan. Persp. 1, 6 (1982).

[15] Forrest, Sullivan & Tietze, *Abortion in the United States, 1977-78*, 11 Fam. Plan. Persp. 329 (1979).

[16] Henshaw, Forrest & Van Vort, *Abortion Services in the United States, 1984 and 1985*, 19 Fam. Plan. Persp. 63 (1987).

[17] Henshaw, *The Characteristics and Prior Contraceptive Use of U.S. Abortion Patients*, 20 Fam. Plan. Persp. 158 (1988).

[18] *See* Appendix.

[19] Torres & Forrest, *supra*, note 11.

and that this option must be offered to such women within the context of any family planning program.[20]

Title X, however, rejects this approach for government-funded family planning programs. Representative Dingell, in offering the amendment which became Section 1008, left no doubt that it was intended to exclude non-complying programs from Title X funding.

> During the course of House hearings . . . there was some confusion regarding the nature of the family planning programs envisioned, whether or not they extended to include abortion as a method of family planning. With the "prohibition of abortion" amendment . . . the committee members clearly intend that abortion is not to be encouraged or promoted *in any way* through this legislation. *Programs which include abortion as a method of family planning are not eligible for funds allocated through this act.*

116 Cong. Rec. 37375 (1970) (statement of Rep. Dingell). (Emphasis supplied). Furthermore, Representative Dingell pointed to evidence that the inclusion of abortion in Title X programs would provide a disincentive to the development and responsible use of preconception means of family planning, and thus, would be antithetical to the central purposes of Title X.[21] In light of the current practice of abortion on demand, a development which is facilitated by many providers of family planning services, the need for rigorous enforcement of the prohibition in Section 1008 exceeds that which existed at the time Title X was enacted.

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[20] *See* Brief of *Amici Curiae* Planned Parenthood Federation of America and National Family Planning and Reproductive Health Association [NFPRHA], at 6-7. More extensive discussion of the incorporation of abortion into government-funded family planning programs is provided in Section I (C), *infra*.

[21] 116 Cong. Rec. 37375 (1970) Representative Dingell cited statistics from other industrialized notions which demonstrated "that the prevalence of abortion as a substitute or a back up for contraceptive methods can reduce the effectiveness of family planning programs."

C. Under Previous HHS Guidelines, Title X Programs Have Violated Section 1008 by Treating Abortion As a Method of Family Planning.

Previous HHS program guidelines and practices have not adequately enforced the restriction in Section 1008. As a result, many Title X programs promote abortion as a family planning option to their pregnant clients, and some closely affiliate themselves with abortion clinics for the purpose of providing cross-referrals.[22] As a result, Title X funding has, prior to the current regulations, been employed to support programs where abortion is treated as a method of family planning.

1. *Section 1008 Has Not Been Adequately Enforced with Respect to Separation of Family Planning and Abortion Facilities*

A 1982 report by the Comptroller General of the United States documented both a lack of clear enforcement by HHS of Section 1008, and a pattern of clinic activities which, at the very least, blurred the distinction between abortion and family planning set forth in Title X funding has, prior to the current Regulations, HHS policy at that time permitted Title X recipients:

> to use organizational techniques to insulate the [T]itle X program from abortion activities prohibited by [S]ection 1008 and thereby not jeopardize their eligibility for [T]itle X funds. Because the distinction between the recipients' [T]itle X and other activities may not be easily recognized, the public can get the impression that Federal funds are being used improperly for abortion activities.[23]

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[22] Planned Parenthood and NFPRHA, which represent 85 percent of the agencies and organizations funded under Title X, candidly admit that counseling of abortion as a means of fertility control is an "integral part of any program that provides medically-based family planning services. . . . A woman choosing [certain] methods of family planning also needs information about the availability of abortion as a backup if contraception fails." *Amici* Brief, *supra* note 20 at 6.

[23] Report, *supra*, note 10, J.A. 85.

The Comptroller General noted that "74 organizations receiving [T]itle X funds perform abortions at clinics co-located with family planning programs." His report further noted that in certain clinics, counseling practices did not present alternatives to abortion, and educational materials presented abortion as a backup to barrier methods of contraception. The report concluded that there was a lack of clear policy guidelines on allowable and unallowable activities relating to abortion in Title X clinics.

Two examples cited by the Comptroller General demonstrate the lack of separation between abortion and family planning programs. In one case, the Title X grantee formed a separate corporation to provide abortion services, but maintained effective control over that corporation through interlocking directorship and the right to appoint trustees. The abortion clinic, which performed 1000 abortions per year, operated on the second floor of the same three-story building in which the family planning clinic also leased space. The two clinics operated simultaneously and shared an executive director, financial manager and other employees.[24]

In the second case, a Title X clinic offered abortion services only for the first 90 minutes of the business day, then subsequently operated a family planning clinic for the remainder of the day. The two clinics were operated by the same corporation and staffed by the same personnel. Furthermore, the abortion clients were counted as family planning clients for purposes of Title X reporting, and these abortion patients accounted for one-third of the total caseload.[25]

The record below establishes that such arrangements are not aberrational. Indeed, Petitioners contend that co-location of abortion and family planning services is mandated by Title X's goal of providing "comprehensive"

[24] J.A. 101-102.

[25] J.A. 102-103.

access to family planning services. Rust Brief at 49.[26] The directors of such "co-located" clinics candidly testified in the district court that such arrangements are "necessary" to provide adequate family planning services.

- The plaintiff, Dr. Rust, testified that his clinic provided family planning services to 7,138 patients in 1986, and performed 2,000 first trimester abortions during the same period. In his view, "integrated services are needed to facilitate enrollment in counseling and family planning programs." [27]
- A director of four affiliated Title X clinics testified that 70 percent of patients with positive pregnancy tests were referred for abortion, and that 80 percent of those patients obtained their abortions at the one affiliated clinic which provides abortions.[28]
- The director of a family planning project located at a hospital in New York City testified that pregnant clients who choose abortion "because of contraception failure, improper use of contraceptives, or for any other elective reason," or for medical indications, are referred for abortion to the area of the hospital where abortions are performed through the twentieth week of pregnancy.[29]
- The director of a non-profit clinic in Jersey City which receives 33 percent of its funding from Title X testified that, on an annual basis, 6,000 women receive family planning services, 4,000

[26] Even if Title X's general intent to provide comprehensive family planning services were relevant to this analysis, it is clear that the more specific dictates of Section 1008 control. Thus, the prohibition on abortion as a method of family planning would supercede the argument that such affiliations with abortion clinics are necessary to provide "comprehensive" family planning services.

[27] Rust Affidavit, ¶¶ 5, 18, J.A. 248, 249, 256.

[28] Drisgula Affidavit, ¶¶ 10, 11, J.A. 148, 150-151.

[29] Affidavit of Hiroko T. Felton, M.D., ¶¶ 9-12, *State of New York v. Bowen*, No. 88-6204 (2nd Cir. 1989) Joint Appendix, Vol. 2 at 524A, 526A-527A.

> pregnant women receive "options counseling," and 1,538 abortions are performed. Appointments for abortions at the same clinic are arranged at the end of the counseling session. The director further testified that provision of abortion services alongside family planning and prenatal services "results in higher quality health care for women."[30]

Abortion services at these clinics are a part of the family planning program underwritten by Title X in four respects. First, abortions are sometimes performed in the same facility, as in the case of the Jersey City Clinic. Second, the funded entity is able to use its Title X program to provide a steady basis of client referrals for its abortion services. Third, Title X funds underwrite the counseling and referral for abortions provided on-site at the family planning clinic. Fourth, co-location provides the unavoidable appearance that abortion is accepted as a method of family planning by the Title X clinic. The view of Petitioners and their witnesses, that integration of abortion and family planning services is beneficial, serves only to underscore how far these providers have departed from the original intent of Title X. The fact that these Title X-funded programs, and scores of others, choose to operate in violation of the policy stated in Section 1008 establishes the need for these regulations.

2. *The 1981 HHS Guidelines Regarding "Options Counseling" Have Permitted Title X Grantees to Promote Abortion as a Method of Family Planning, In Violation of Section 1008.*

In 1981, HHS issued non-regulatory "Guidelines" for the operation of Title X programs.[31] According to the

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[30] Affidavit of Marilyn Bennett, ¶¶ 8, 14, 24, J.A. 282-283 (Excerpts); Court of Appeals Joint Appendix, Vol. 2 at 494A, 496A, 502A (Full Affidavit).

[31] Department of Health and Human Services, Bureau of Community Health Services, *Program Guidelines for Project Grants for Family Planning Services* (1981). J.A. at 71a.

Guidelines, pregnant women should be offered counseling regarding their pregnancy, and those who request information on the "management" of their pregnancies "are to be given non-directive counseling on the following alternative courses of action, and referral upon request: pregnancy care and delivery; infant care, foster care or adoption; pregnancy termination."[32] The Comptroller General acknowledged these Guidelines, but concluded that Title X projects still lacked sufficient guidance on the level of permissible activity related to abortion.[33] Moreover, the Comptroller General documented that a large percentage of Title X clinics engaged in "questionable" counseling practices which had the effect of treating abortion as a method of family planning.[34] This extended as well to the referral practices of these clinics.[35] The Comptroller General recommended that "the Secretary establish clear operational guidance" on the activities relating to abortion that are or are not allowed.[36]

One reason that the 1981 Guidelines were insufficient is that they deviated from the original intent of Title X in two critical respects. First, they incorporated *post*-conception counseling and treatment into a program that was solely designed to support *preventive* family planning measures. Second, they institutionalized the practice of abortion counseling in the operation of a statute which expressly prohibits the funding of programs that promote abortion as a means of family planning.

It is not surprising, then, that these Guidelines have permitted counseling and referral for abortion to become

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[32] *Id.*, Sec. 8.6.

[33] J.A. 116, 120.

[34] J.A. 114-115.

[35] J.A. 116-117.

[36] J.A. 121.

integrated into Title X-funded programs. The Comptroller General documented an existing bias in favor of abortion exhibited by a representative sample of Title X providers.[37] Further evidence is provided by the testimony in this case, and the training materials submitted to the Office for Population Affairs by Title X training and service grantees.[38] These materials illustrate that abortion is incorporated as a method of family planning at Title X clinics in the following specific ways: a fundamental commitment to the availability and use of abortion as a means of family planning; the presentation of abortion to the pregnant client as an option equivalent to prenatal care and childbirth; and the encouragement of abortion through the use of counseling techniques which affirm and support the decision-making process leading up to abortion.

The commitment to abortion is summarized in the testimony of Dr. Rust, stating that "[n]o responsible family planning decision can be made without information about every alternative available, including that of abortion, in the event that contraceptive failure occurs."[39] A widely utilized training guide published by a Planned Parenthood affiliate asserts that "the prevention of unwanted pregnancies and access to quality medical services, including legal abortion, are essential to reducing maternal and infant mortality."[40]

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[37] J.A. 114-118.

[38] Copies of these training materials were obtained from the Deputy Assistant Secretary for Population Affairs through a request under the Freedom of Information Act.

[39] Affidavit of Irving Rust, M.D. ¶ 9 (February 5, 1988) J.A. 248, 251.

[40] Saltzman & Policar, *The Complete Guide to Pregnancy Testing and Counseling*, 119 (Planned Parenthood, Alameda/San Francisco 1985) (hereinafter cited as "Planned Parenthood Guide").

As a result of this commitment, and the policy reflected in the Guidelines, Title X training material presents abortion as one of three equivalent options for dealing with an unplanned pregnancy. In an HHS publication on counseling adolescents, counselors are recommended to review, with pregnant clients who have chosen abortion, issues such as scheduling, transportation, and payment for the abortion.[41] A policy promulgated by the North Dakota health department states that each delegate agency under that state's Title X program "should provide information to the client on all legal alternatives to problem pregnancy . . . encouraging her to examine the advantages and disadvantages of each of the legal options," including abortion.[42] A Planned Parenthood guide recommends that a counselor who has "strong feelings" in the case of a woman who uses abortion as her exclusive means of birth control, and is seeking her forth abortion, remain unbiased, and refer the woman to another counselor if necessary.[43]

Furthermore, although Title X and the 1981 Guidelines clearly prohibit the encouragement of abortion, significant portions of the Title X training material discuss methods for ameliorating negative feelings toward abortion. For example, the Planned Parenthood guide dis-

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[41] Spain, *Counseling Adolescents in Reproductive Health Care Settings*, (Department of Health and Human Services, Bureau of Community Health Service, 1980).

[42] Correspondence, Deb Arnold, Director of North Dakota Family Planning Program to Joyce Elmore, Director of Training, Office of Population Affairs, Department of Health and Human Services, December 14, 1989.

[43] Planned Parenthood Guide, *supra* note 40 at 24. The point of this example is not to argue whether or not counselors should allow personal bias to cloud their professional judgment in the counseling relationship. Rather, this example illustrates the extreme to which the "options counseling" ethic may be used to screen out *any* negative assessment of abortion as a means of family planning.

cussed above presents the hypothetical situation of a married woman who has agreed to have an abortion, but is having difficulty accepting the decision. The suggested responses include: "Tell her that no one makes the decision to have an abortion easily or ever feels really 'good' about it. Acknowledge that feelings of discomfort and sadness are normal; Ask about the reasons for which she and her husband decided on an abortion. Help her to reaffirm that this is the best decision for them right now; Remind her that feelings of guilt, sadness or loss do not mean that a wrong decision was made." [44] The HHS publication on counseling of adolescents notes that where a client experiences anxiety and guilt over her decision to abort, "the counselor may be able to reduce the intensity of the feelings *or the possibility of their interfering with commitment to the plans.*" [45]

The previous examples demonstrate that many grantees see no actual difference between "options counseling" and the encouragement of abortion. They demonstrate, in a concrete way, the justifiable concerns that led Congress to enact Section 1008.

II. THE NEW REGULATIONS ARE NECESSARY TO ENFORCE THE MANDATE OF SECTION 1008 AND POSE NO THREAT TO WOMEN'S HEALTH.

A. The New Regulations Are Essential to Enforce Section 1008.

Title X reflects "a fundamental dichotomy between the provision of preventive and other pre-pregnancy family

[44] Planned Parenthood Guide, *supra* note 40, at 24-25.

[45] Spain, *Counseling Adolescents*, *supra* note 41 at 88 (emphasis supplied). This 1980 HHS publication also suggests potential respouses to clients who fear alienation from their church over their abortion decision: "You're really worried that you're going to feel strange in church after having the abortion. What would help you with that strange feeling? . . . You pointed out to me that, even though abortion is against your religion, having a baby when you're not married is also." *Id.*

planning services, on the one hand, and abortion on the other." [46] This dichotomy has been breached due to: dramatic change in the legal status of abortion; providers embracing abortion as a means of family planning; and lack of direction in enforcing the restrictions of Section 1008. In recognition of changed circumstances, and the failure of previous efforts to effectively monitor program conduct, the new Regulations are necessary to preserve the "fundamental dichotomy" mandated by Congress.

1. As illustrated above, it is virtually impossible for HHS to permit (or require) abortion counseling, without compromising the restrictions of Section 1008. The Petitioners and certain *amici* argue that this inconsistency can be resolved by reading Section 1008 to prohibit *only* the direct funding of abortion with Title X grants. This Court is well acquainted with the ability of Congress to restrict funding for the purposes of *performing* abortions. *Harris v. McRae*, 448 U.S. 297 (1980). However, the language of Section 1008 is not so limited.[47] Current practice is largely in conflict with that language.

The appropriate solution, wholly consistent with the purposes of Title X, is to refer a client diagnosed as pregnant to those providers in the health care system who can meet her need for prenatal care and social services counseling. Section 59.8 of the new Regulations,

[46] 52 Fed. Reg. 33210 (Sept. 1, 1987).

[47] The Department has recognized this fact since the enactment of Title X. An internal memorandum from legal counsel dated April 1971 stated that a "literal" reading of Section 1008 would limit the prohibition to programs "in which abortions *are provided* as a means of family planning." (Emphasis in original). However, relying upon the legislative history, this "literal" interpretation was dismissed. "[I]t is apparent that the Congressional intent was to prohibit a broader scope of activity than a literal reading of section 1008 would require." Memorandum from J. Mangel, Deputy Asst. General Counsel, to L. Hellman, M.D., Deputy Assistant Secretary for Population Affairs (April 20, 1971) J.A. 35, 36-37.

which incorporates this requirement, does not disturb the ability of the Title X clinic to deliver, or the client to receive, the *preventive* family planning services which Title X was intended to support. Moreover, the referral requirement, by providing clear guidance to grantees on the permissible scope of post-pregnancy counseling, addresses a major concern noted by the Comptroller General.

2. The requirement of separation from abortion-related services is justifiable and essential to the integrity of the Title X program. In some instances, the provision of abortion services by a Title X grantee is a *de facto* component of the Title X program—a circumstance which offends even the crabbed interpretation of Section 1008 suggested by the Petitioners. In other instances, where the abortion services are arguably part of a separate "program," but are co-located with the Title X recipient, the opportunity for public confusion over the scope of the family planning program, and for indirect support of abortion services with government funds, is still present. Therefore, contrary to the arguments of Petitioners and certain *amici curiae*, the physical and financial separation requirements are neither arbitrary and capricious, nor inflexible.[48]

3. The interchangeable definitions of "program" and "project" [49] are necessary to avoid the use of accounting and bookkeeping techniques by Title X-funded entities to "separate" their abortion and non-abortion activities. Similarly, these definitions are necessary to ensure that no program or project which is approved for funding by HHS under Title X is employing program or project funds for prohibited purposes—whether or not those

[48] For further discussion of this point, see Brief of the American Academy of Medical Ethics as *Amicus Curiae* in Support of Respondent ("AAME Brief").

[49] 42 C.F.R. 59.2.

funds are received directly from the federal government.[50] The necessity for this restriction is clear. The government should be free to demand, in funding a particular program, that the program carry out the purposes for which the government has selected it, and *not* carry out purposes to which the government is opposed. These definitions do not mean that an entire *organization* is prevented from receiving Title X funds if a separate program within that organization engages in practices outside the scope of Title X.[51] However, they do mean that Title X funds will not go to specific programs which engage in these practices.

B. The Requirement of Referral to Prenatal Care Providers Will Not Adversely Affect the Health Interests of Women.

Title X is not a maternal or infant and child health care program. Nothing in the legislative history suggests otherwise. Indeed, a large amount of Title X funds are distributed to freestanding clinics, which lack the ability to provide general prenatal and obstetrical care. Given these basic limitations of the Title X program, and the urgent need for pregnant women (especially the poor) to receive early prenatal care, Title X clinics should refer their pregnant patients immediately to sources where such care can be obtained. Thus, the requirement of § 59.8, that the pregnant client be furnished "a list of available providers that promote the welfare of mother and unborn child," is clearly in the best interests of these pregnant clients.

[50] The definition of "program" is consistent with that generally employed by the Public Health Service. *See* PHS Grants Policy Statement, Department of Health and Human Services 4 (Rev. 1987) ("program" defined in part as "[a] coherent assembly of plans, projected activities, and supporting resources contained within an administrative framework, whose purpose is to implement an organization's mission or some specific program-related aspect of that mission.")

[51] *See* AAME Brief, *supra* note 48.

Petitioners' objections to this requirement are unavailing. They assert that the Regulations will harm maternal health because women will not be properly informed of the abortion option, even when that option is medically indicated. This reflects the Petitioners' underlying theory, that the Regulations impose an unauthorized barrier between Title X programs and access to a necessary reproductive health service, i.e., abortion. However, both the theory and the assertion are flawed because they misrepresent the status of abortion as a medically necessary procedure; they ignore the potential physical and psychological complications of abortion; and they misconstrue how these regulations apply to cases where a pregnancy poses a genuine risk to maternal health.

1. *Where Medical Indications for Abortion Are Present, a Title X Clinic Should Refer the Patient to a Specialist in Her Underlying Condition for Care and Counseling.*

Abortion is, almost exclusively, an elective procedure. Medical indications for abortion are limited, particularly in the case of first-trimester abortion.[52] Among the commonly-cited medical conditions in which a physician purportedly "must advise a woman that abortion is an option she should consider" [53] are diabetes, cardiac disease, and certain forms of cancer. However, these conditions almost never require an immediate referral for abortion; rather, they require that a woman be referred immediately to a specialist in her underlying condition. That specialist, not a family planning clinic (and certainly not an abortion clinic), is the only party qualified to counsel a woman regarding the relative risks of continuing the pregnancy to term and abortion. The proper role for the Title X clinic in such a case is referral to the appropriate specialist, a course of action that is already mandated by pre-existing Title X regulations. 42 C.F.R. § 59.5(b)(1) (requiring projects to "[p]rovide for . . . necessary referral to other medical facilities when medically indicated.")

[52] The term "abortion," as used herein, does not refer to a procedure to remove the fallopian tube in which an ectopic pregnancy has implanted. Such a procedure is clearly within the scope of the "emergency care" exception to Section 59.8 of the Regulations.

[53] Brief of Amici Curiae Planned Parenthood and NFPRHA, *supra*, note 20 at 8.

For example, immediate counseling of a pregnant client with diabetes regarding abortion is clearly not mandatory. Advances in the management of pregnancy for diabetics result in birth outcomes that are nearly equivalent to those for non-diabetic mothers.[54] The non-deformed offspring of diabetic women have a perinatal mortality rate that is virtually equivalent to that of the offspring of non-diabetic women: provided that their mothers receive proper prenatal care.[55] Thus, these women can be successfully managed in their pregnancies, and abortion is not medically indicated.[56]

Similarly, "[t]he majority of cardiac patients can enjoy a successful pregnancy outcome." [57] The exceptions to this statement include patients with pulmonary hypertension, Marfan's syndrome, and patients with poor outcomes after corrective surgery, or with advanced coronary artery disease.[58] Such patients are or should be under the care of a cardiologist or other specialist. Those who are not, and are diagnosed as pregnant by a Title X clinic, should be immediately referred to such a special-

[54] Freinkel, *et al.*, *Care of the Pregnant Woman with Insulin-Dependent Diabetes Mellitus*, 313 New Eng. J. Med. 96 (1985).

[55] C. Pauerstein, ed., *Clinical Obstetrics and Gynecology*, 667 (1987). This figure excludes deaths due to major congenital deformations, which are themselves becoming more rare in cases of pregnant diabetics. *Id.* at 674.

[56] Pauerstein, *supra* note 55 at 667-674.

[57] Pauerstein, *supra* note 55, at 630.

[58] *Id.* at 630.

ist for further care and counseling, both of which lie outside the "family planning" specialty.[59]

Abortion is also not generally indicated for pregnant women suffering from breast cancer. "The few clinical reports that detail survival in patients who aborted early in pregnancy demonstrate no subsequent advantage gained by that intervention." [60] Other clinical studies show no statistically significant difference between the survival rate of women whose breast cancer occurred during a pregnancy and other breast cancer patients.[61] Medical indications for termination of pregnancy to save the mother's life, arise only in very limited circumstances.[62] Obviously, a woman in such a condition should not be under the care of a Title X clinic, but under the care of an oncologist or other specialist.

The picture is the same with regard to pregnancy and other malignancies, including Hodgkin's Disease,[63] brain

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[59] The small likelihood that cardiac patients for whom abortion may be indicated will not already be under the care of a physician *other* than a Title X clinic physician is illustrated by the functional description of their disease classification. Therapeutic abortion is indicated only for those patients with a marked or total limitation upon normal physical activity, and for whom physical activity results in fatigue, palpitation, dyspnea, or anginal pain. Pauerstein, *supra* note 55 at 630. A patient in such a condition, if not already under the care of a cardiac specialist, should immediately be referred to one.

[60] Pauerstein, *supra* note 55, at 809, *citing*, DiSaia, P.J. & Creasman, W. T., *Clinical Gynecologic Oncology* (2d ed. 1984) at 428-464.

[61] Pauerstein, *supra* note 55, at 809.

[62] *Id.* at 809.

[63] *Id.* at 812 ("Pregnancy has no effect on the disease, and therapeutic abortion does not increase survival." Early delivery or therapeutic abortion may be indicated primarily where there is concern over teratogenic effect of treatment upon unborn child.)

tumors,[64] and leukemia. Abortion may be considered, but this must be done in conjunction with a full review of the effect of available therapeutic options on both the mother and the fetus, and the possibility of adjusting therapy to the mother which might allow the birth of a healthy infant.[65] The treatment and management of cancer, and the management of pregnancy in a woman so afflicted, are outside the conceivable scope of services in a Title X clinic. Where a Title X clinic suspects that a pregnant woman may have cancer, that clinic *must* refer to a competent specialist in that field. This is required by § 59.5 (b) (1) of the current regulations.

2. *Abortion Imposes a Risk of Physical and Psychological Harm to Women.*

The physical and psychological risks of a medical procedure are relevant to any decision whether or not to undergo that procedure. This is likewise true of abortion when utilized as a means of family planning. However, the 1981 "options counseling" Guidelines of HHS did not require Title X grantees to provide any information regarding such risks, and instead, permitted immediate referral of pregnant clients to entities which specialize in the performance of abortions. Thus, clients could be counseled as to their "options," without complete information as to the consequences of their decision.

Petitioners and their *amici* focus upon the purported risks of child-bearing, but disregard the genuine risks to maternal life and health posed by abortion. In fact, Petitioners discuss abortion as if it were risk-free. This is not the case.[66] The legalization of abortion has not had

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[64] *Id.* at 826-827 (management of pregnancy is possible; therapeutic abortion may be recommended because of rapid progression of symptoms and high mortality).

[65] *Id.* at 803.

[66] *See, The "Abortion Profiteers,"* Chicago Sun-Times, Nov. 12, 1978 (results of five-month detailed investigation into conditions

a dramatic impact in reducing abortion-related maternal mortality. The Centers for Disease Control reported a total of 175 abortion deaths between 1972 and 1981, 83 of which were associated with first-trimester abortions.[67] CDC experts admitted that "it is likely that CDC has not identified all abortion deaths in the United States," and that while CDC's counting of abortion deaths is the most comprehensive available, the numbers "may also reflect an undercount of the true number of total deaths."[68] Both overall and abortion-related maternal mortality have been on a steady downward trend for decades, and "the legalization of abortion has had no effect" on this trend.[69]

Furthermore, claims that "abortion is safer than childbirth" are compromised not only by the likelihood that deaths relating to abortion are underreported, but also by the fact that the methods employed by some statisticians do not present a valid comparison between abortion and childbirth. For example, most studies consider as deaths related to "childbirth" virtually *all* cases of maternal mortality not related to induced abortion, whenever they occur. When comparison is made between abortion and natural pregnancy during corresponding

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at clinics in Chicago); *Tragic End to Ghanaian's Dream*, Newsday, June 9, 1989, at 6 (death of 28-year old immigrant after abortion at unregulated "storefront" clinic in Brooklyn); *Hospital Shut Down as Health Risk Will Reopen for Abortions Tomorrow*, Los Angeles Herald Examiner, Feb. 12, 1988, at A-1.

[67] *Hodgson v. Minnesota*, 3-81-Civil-538 (D. Minn. 1986), Tr. at 2125 (Testimony of Richard T.F. Schmidt, past president, American College of Obstetricians and Gynecologists, *citing*, *Abortion Surveillance 1985*, U.S. Dept. of Health and Human Services, Centers for Disease Control.)

[68] Cates, *et al.*, *Morality from Abortion and Childbirth: Are the Statistics Biased?*, 248 J.A.M.A. 192, 193 (1982).

[69] Hilgers and O'Hare, *Abortion Related Material Mortality: An In-Depth Analysis*, in New Perspectives on Human Abortion, 69, 73 (Hilgers, Horan, Mall, ed., 1981).

periods of gestation, natural pregnancy is shown to be *safer* than induced abortion.[70]

The potential non-lethal complications of induced abortion, although often minimized, have also been documented in the medical literature. A leading textbook acknowledges that "[i]n medical practice there are few surgical procedures given so little attention and so underrated in its potential hazards as abortion."[71] Cates and Grimes, who have consistently advocated the relative safety of abortion,[72] nevertheless acknowledge that in absolute medical and economic terms, the incidence of maternal mortality and morbidity is significant:

> The scope of the problem of abortion complications is large, both numerically and economically. For exemple, in 1977, nearly 100,000 women in the United States sustained complications of abortion, and 16 died. . . . Excluding the indirect cost of treating women who suffered complications in 1977 was over $22 million.[73]

Finally, abortion poses significant risks of psychological harm, including depression, obsession, prolonged guilt and anger, and isolation.[74]

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[70] *See*, Hilgers & O'Hare, *supra*, at 86-89 (comparison of maternal mortality rates from induced abortion and natural pregnancy during first 20 weeks and final 20 weeks of pregnancy); Lanska, *et al.*, *Mortality from Abortion and Childbirth*, 250 J.A.M.A. 361-362 (1983) (correspondence noting maternal mortality rate for *vaginal* deliveries is less than death-to-case rate for legal abortions.)

[71] W.H. Hern, M.D., *Abortion Practice* 101 (1984).

[72] *See, e.g.*, LeBolt, Grimes & Cates, *Mortality From Abortion and Childbirth*, 248 J.A.M.A. 188 (1982).

[73] Grimes & Cates, *Abortion: Methods and Complications*, in *Human Reproduction*, 2d ed., Reprinted by U.S. Public Health Service, Dept. of Health and Human Services.

[74] Note, *Abortion Counseling: To Benefit Maternal Health*, 15 Am. J. of Law & Med. 483, 488-490 (1989); A. Speckhard, *The Psycho-Social Aspects of Stress Following Abortion* (1987).

The risks of maternal mortality and morbidity, and psychological harm, are clearly relevant to any voluntary and informed decision regarding abortion.[76] Yet, neither the "options counseling" Guidelines issued by HHS in 1981, nor the counseling training materials used by Title X grantees, mandate discussion of these risks. This seriously compromises Petitioners' claim that nondirective "options counseling" is the appropriate response to an unplanned pregnancy.

Rather than reform these Guidelines to require more extensive counseling regarding abortion and childbirth, the Secretary has determined that this counseling should not be provided at all under Title X, but is more properly the domain of those entities who provide prenatal and/or abortion services. This is clearly a rational determination, made more so by the constitutional uncertainty regarding "informed consent" requirements for abortion. *See, Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).

3. *The Regulations Impose No Burden on Access to Appropriate Medical Care in Situations of Medical Emergency or Necessity.*

The Conference Report on Title X stated that it was "the intent of both Houses that the funds authorized under this legislation be used only to support *preventive* family planning services, population research, infertility services, and other related medical, informational, and educational activities." Conf. Rep. No. 91-1667, 91st Cong, 2d Sess., U.S. Code, Cong. & Admin. News at 5080, 5081-5082 (1970) (emphasis supplied). Title X funds, therefore, were not to used for non-preventive family planning, i.e., abortion, or for post-conception prenatal care and services. Nor were Title X grantees ex-

[76] *See* Note, *Abortion Counseling*, *supra* note 74 at 492-494 ("Many women experience more anger following the abortion, specifically at abortion personnel, if the women believe the counseling is inadequate.")

pected to assume the role of other health care providers. Rather, grantees were to fill a need not being met by other providers, and supply a resource to these providers on family planning questions. Thus, referral from the Title X clinic to other sources of care is the proper means for the clinic, in the case of a pregnant client, to "integrate" with the general health care system.

For those situations in which pregnancy poses a threat to maternal life or health, or in which pregnancy causes a medical emergency, the new Regulations do not restrict access to appropriate medical care, even if that includes an induced abortion or early delivery. First, the regulations provide a specific exemption for "emergency care," and require Title X recipients "to refer the client immediately to an appropriate provider of emergency medical services." 42 C.F.R. § 59.8(a)(2). Second, § 59.5(b)(1) of the Regulations requires Title X projects to provide necessary referrals to other medical facilities where indicated. Third, the regulations allow referral to providers of prenatal care which may also perform abortions.

Therefore, a Title X client whose condition calls for consideration of abortion will not be denied access to that advice. Rather, the client, under the new Regulations, will be referred to a medical provider capable of assessing and managing a high-risk pregnancy. In such circumstances, abortion is not a "method of family planning," and therefore, neither the prohibition of Section 1008, nor the specific restrictions of these Regulations, apply. However, the existence of such circumstances do not deprive the Secretary of the authority to require that, in general, the pregnant clients of Title X clinics receive referrals to prenatal care.

Finally, the new Regulations neither require nor permit the abandonment of the pregnant Title X client. Once the appropriate referral is made, that client "must be provided with information to protect the health of

mother and unborn child until such time as the referral appointment is kept." 42 C.F.R. § 59.8(a)(2).

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

Of Counsel:
LEANNE E. MCCOY
AUL LEGAL DEFENSE FUND
343 S. Dearborn Street
Suite 1804
Chicago, Illinois 60604
(312) 786-9494

EDWARD R. GRANT
(Counsel of Record)
222 No. LaSalle Street #300
Chicago, Illinois 60601
(312) 704-3000
Attorney for Amici Curiae

September 7, 1990

APPENDIX

APPENDIX [1]

ABORTION IN THE UNITED STATES

The following chart was compiled from data published by researchers affiliated with the prochoice Alan Guttmacher Institute. They have compiled the most complete and reliable data about abortion in the United States. (The Center for Disease Control publishes abortion statistics also, but it uses state-gathered information, whereas A.G.I. also obtains data from abortion providers). Thus, some C.D.C. annual abortion reports have been 15% underinclusive. *See* C. TIETZE, INDUCED ABORTION: A WORLD REVIEW, 1981, at 19-26 (1981).

Year Married	Number of Abortions Late [a] *** [b]	Abortion Rate * [a]	Abortion Ratio ** [a]	% Repeat *** [b]	% Under 19 Yrs. [b]	% Not Married [b]	Past 1st Trimester *** [b]
1972	587,000	—	—	—	—	—	—
1973	745,000	16.3	193	—	32.8	71.0	14.6
1974	899,000	19.3	220	15.2	32.5	72.4	12.0
1975	1,034,000	21.7	249	20.5	32.9	73.7	10.8
1976	1,179,000	24.2	265	22.7	32.1	75.4	9.8
1977	1,317,000	26.4	286	26.6	31.3	77.2	9.0
1978	1,410,000	27.7	294	29.5	30.8	76.5	8.9
1979	1,498,000	28.8	297	31.7	30.8	78.5	8.8
1980	1,554,000	29.3	300	33.0	29.6	79.4	8.7
1981	1,577,000	29.3	300	35.1	28.5	81.1	8.8
1982	1,574,000†	28.8	299	36.8	27.5	80.9	8.1
1983	1,575,000‡	27.4	294	38.8	27.1	81.3	9.5
1984	1,577,000	28.1	297	—	—	—	—
1985	1,589,000	28.0	298	—	—	—	—
1986	—	—	—	—	—	—	—
1987	—	—	—	42.9	25.5	81.5	—

[1] This Table originally appeared in Wardle, *"Time Enough"*: Webster v. Reproductive Health Services *and the Prudent Pace of Justice*, 41 Fla. L. Rev. 881, 985-986 (1989). Reprinted with permission of the Florida Law Review, © 1989.

* Per 1,000 women 15-44

** Per 1,000 known pregnancies (live births plus abortions)

*** Women having second or more abortion

**** Thirteen or more weeks from last menstrual period

[a] CENTER FOR DISEASE CONTROL, ABORTION SURVEILLANCE, ANNUAL SUMMARY, 1978, at Table 1 (1980) (for 1972); Henshaw, *Trends in Abortion, 1982-84*, 18 FAM. PLAN. PERSP. 34 (1986); Henshaw, Forrest & Blaine,

Abortion Services in the United States, 1981 and 1982, 16 FAM. PLAN. PERSP. 119, 121 (1984) (for 1981-82); Henshaw, Forrest & Van Vort, *Abortion Services in the United States, 1984 and 1985*, 19 FAM. PLAN. PERSP. 63 (1987) (for 1985); Henshaw, Forrest, Sullivan & Titeze, *Abortion Services in the United States, 1979 and 1980*, 14 FAM. PLAN. PERSP. 1, 6 (1982) (for 1973-80) estimated 3%-6% shortfall in data); *Contraception and Abortion Costs Are Tiny Portion of U.S. Health Spending*, 18 FAM. PLAN. PERSP. 87 (1986).

[b] Forrest, Sullivan & Tietze, *Abortion in the United States, 1977-78*, 11 FAM. PERSP. 329 (1979) (for 1973-78); Henshaw, *The Characteristics and Prior Contraceptive Use of U.S. Abortion Patients*, 20 FAM. PLAN. PERSP. 158 (1988) (for 1987); Henshaw, *Characteristics of U.S. Women Having Abortions, 1982-1983*, 19 FAM. PLAN. PERSP. 5 (1987) (for 1982-83); Henshaw, Binkin, Blaine & Smith, *A Portrait of American Women Who Obtain Abortions*, 17 FAM. PLAN. PERSP. 90 (1985) (for 1980-81); Henshaw & O'Reilly, *Characteristics of Abortion Patients in the United States, 1979 and 1980*, 15 FAM. PLAN. PERSP. 5 (1983) (for 1979-80).

† Total cost for all abortions in 1982—$484 million.

‡ Average amount paid for *1,068,000 first-trimester abortions* in 1983—*$200 per abortion.*

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Nos. 89-1391 and 89-1392

IN THE

Supreme Court of the United States

October Term, 1990

RUST, et al., - - - - - - - - - - - - - - - - - - Petitioners,

versus

SULLIVAN, - - - - - - - - - - - - - - - - - - Respondent.

THE STATE OF NEW YORK, et al., - - - - - - - Petitioners,

versus

SULLIVAN, - - - - - - - - - - - - - - - - - - Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief of Catholics United for Life, Orthodox Christians for Life, National Organization of Episcopalians for Life, Presbyterians Pro-Life, Southern Baptists for Life, American Baptist Friends for Life, Baptists for Life, Lutherans for Life, WELS Lutherans for Life, Moravians for Life, United Church of Christ Friends for Life, Task Force of United Methodists on Abortion and Sexuality, and the Christian Action Council as Amici Curiae in support of Respondents.

Of Counsel:

Charles E. Rice
Notre Dame Law School
Notre Dame, IN 46556

Michael J. Laird
608 S. Walnut Street
Arlington Heights, IL 60006

Thomas Patrick Monaghan
Jay Alan Sekulow
Walter M. Weber
(Counsel of record)
C. Peter Thomas S. Cornell
James E. Murphy
Free Speech Advocates
6375 New Hope Road
New Hope, KY 40052
(502) 549-5454

Thomas A. Glessner
Christian Action Council
101 W. Broad St., Suite 500
Falls Church, VA 22046
Attorneys for Amici Curiae

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INTEREST OF AMICI

Catholics United for Life

Catholics United for Life (CUL) is the pro-life apostolate of the St. Martin de Porres Dominican Community. Formed in 1974, CUL has twenty-three affiliates across the country, and promotes sidewalk counseling, a technique it developed for saving babies from abortion. Sidewalk counselors work to save each individual baby threatened by abortion -- through prayer, persuasion, offers of assistance, and distribution of literature. CUL also supplies literature on a national level to promote respect for all human life.

Orthodox Christians for Life

Orthodox Christians for Life is a religious-educational prolife organization consisting of members from all jurisdictions of the Eastern Orthodox Church in the United States and Canada. It was founded and functions in a spirit of synergistic cooperation with the hierarchy, clergy, and laity of the Orthodox Church regardless of jurisdiction or geographical location. The organization supports the doctrines and canons of the Church. Its activities have included the recent coordination and creation of an Amicus Brief submitted to the United States Supreme Court on behalf of the Holy Orthodox Church in *Webster v. Reproductive Health Services* (No. 88-605).

In its moral teachings, the Orthodox Church has had a long and continuous history of outspoken condemnation of abortion which dates back to Apostolic times. In fact, the humanity of the unborn child, his "personhood," and his possession of a soul from the moment of conception have been universally understood in the Eastern Church from the earliest times; these understandings remain unchanged and unchallenged in Orthodox theology to this day.

The Holy Orthodox Church remains a unique witness to historical Christianity's understanding of the sacredness of human life: that the unborn are indeed "persons" and that abortion is considered an act of premeditated murder. Orthodox Christians for Life supports and advocates these historical positions and promotes them not only to the faithful, but to the secular culture at large.

National Organization of Episcopalians for Life

National Organization of Episcopalians for Life Research and Education Foundation, Inc. (NOEL), a non-profit Maryland corporation with national offices in Fairfax, Virginia, is a general organization of the Episcopal Church. NOEL's purposes affirm the sacredness and the right to life of all human beings from conception to natural death. NOEL supports the 1988 General Convention Resolution of the Episcopal Church which "emphatically oppose[s] abortion as a means of birth control, family planning, sex selection or any reason of mere convenience," promotes alternatives to abortion, including adoption, and assists those faced with problem pregnancies through its 113 chapters in 35 states.

Presbyterians Pro-Life

Presbyterians Pro-Life is organized under the rules of the Book of Order of the Presbyterian Church (USA), a denomination with three million members. Its objectives are to proclaim the Church's obligation to protect all innocent human life from conception to natural death and to support women in crisis pregnancies by offering alternatives to abortion. It is governed by a board of directors of thirty lay men and women and pastors, all members of the Presbyterian Church (USA). It has a network of local chapters throughout the denomination and publishes a quarterly newsletter that reaches 20,000 individuals and churches.

Southern Baptists for Life

Southern Baptists for Life (SBL) is a non-profit pro-life advocacy organization, incorporated in the State of Missouri. SBL was established for the purpose of helping Southern Baptists take a firm, visible, and active stand against abortion, infanticide, and euthanasia. SBL concurs fully with the resolution on abortion passed at the 1982 Southern Baptist Convention, ". . . that all human life, both born and preborn, is sacred." SBL is governed by a six member board of directors and a fifteen member advisory board and provides pro-life resources to thirty-seven thousand Southern Baptist churches.

American Baptist Friends of Life

American Baptist Friends of Life is a pro-life advocacy organization within the American Baptist Churches/USA, representing the pro-life position of a large percentage of American Baptists. Directed by an eight member executive committee, it publishes a regular newsletter and is taking leadership in the implementation of its new denominational resolution on abortion passed in June of 1988 which states, "as American Baptists, we oppose abortion as a means of avoiding responsibility for conception."

Baptists for Life

Baptists for Life is a Christian pro-life organization representing independent Baptist Churches throughout the United States with main offices in Grand Rapids, Michigan. Baptists for Life believes in the sacredness of human life at every stage of biological development and in its value throughout the life continuum. It exists to provide alternatives to abortion through the over 2,000 church congregations which it represents.

Lutherans for Life

Lutherans for Life (LFL) is a volunteer pan-Lutheran educational organization seeking to restore respect for life at all its stages and legal protection for unborn children, the handicapped, and the medically dependent. Headquartered in Minneapolis, LFL has 11 chartered state affiliates and more than 200 local chapters across North America.

WELS Lutherans for Life

WELS Lutherans for Life is para-synod organization in fellowship with the 440,000 member Wisconsin Evangelical Lutheran Synod (WELS). WELS Lutherans for Life consists of 26 chapters and 8 congregational branches throughout the United States. WELS resolved at its 1979 synod convention that "the Holy Scriptures clearly teach that the living yet unborn are persons in the sight of God . . . and that we continue to urge our membership to make God's will in this matter known." WELS Lutherans for Life is that specialized ministry which seeks to make known God's will of life and to provide assistance to others in all life issues.

Moravians for Life

Moravians for Life, also known as Mor*Life, is an association of individual members of the North American Moravian Church who are committed to pro-life education and advocacy. It is an unofficial organization outside the church, since the Moravian Church (Northern, Southern and Canadian Provinces) has taken a pro-choice/abortion position.

United Church of Christ Friends for Life

United Church of Christ Friends for Life is a duly constituted special interest group within the United Church of Christ. It upholds the sanctity of human life from conception to natural death and speaks to this issue at every opportunity within the denomination. It produces a quarterly newsletter and is in the process of establishing chapters throughout the denomination.

Task Force of United Methodists on Abortion and Sexuality

The Task Force of United Methodists on Abortion and Sexuality is a national network of over 3,000 pastors, theologians, churches, and laity dedicated to minister to the deepening problems of abortion recidivism and abortion-as-contraception. The view that "life does not begin until live birth" does not represent the position of a large segment of the United Methodist Church. According to our Discipline, only our General Conference speaks the position of the Church, *not* our General Board of Church and Society *nor* our Women's Division. Furthermore, it is recognized that our *Book of Discipline* is the primary source of order and purpose in the Church, not our *Resolutions*. Since 1972, General Conference has asserted in the *Book of Discipline* "our belief in the sanctity of unborn human life." Then in 1988, General Conference stated in *Book of Discipline* paragraph 71G that "We recognize tragic conflicts of life with life that may justify abortion and in such cases support the legal option of abortion under proper medical procedures. We cannot affirm abortion as an acceptable means of birth control and we unconditionally reject it as a means of gender selection." That abortion involves human life before birth is signified by the phrase "conflicts of *life* with *life*" (emphasis added). That abortion should be restricted to minimize indiscriminate practice is signified by

saying that "we cannot affirm abortion as an acceptable means of birth control and we unconditionally reject it as a means of gender selection."

Christian Action Council

The Christian Action Council (CAC), founded in 1975 as a Protestant evangelical pro-life organization, is incorporated in the District of Columbia. Since its founding, the CAC has established 400 crisis pregnancy centers around the country. These crisis pregnancy centers serviced more than 150,000 women in 1987, providing them with support, encouragement, and necessary services to enable them to carry their babies to term. The CAC also counsels and supports women who suffer from the aftermath of abortion. CAC has 120 local CAC affiliate chapters that are activist-oriented and involved politically in promoting pro-life legislation and seeking a reversal of *Roe v. Wade*.

The parties to the present case have consented to the filing of this brief; letters granting consent are being submitted with this brief.

IN THE

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THE STATE OF NEW YORK, et al., - - - - - - - Petitioners,

versus

SULLIVAN, - - - - - - - - - - - - - - - - - - - Respondent.

SUMMARY OF ARGUMENT

This case presents a challenge to various federal regulations alleged to violate a constitutional "right" to abortion. Neither the fifth nor the fourteenth amendment secures any such right. On the contrary, these amendments guarantee the right to life of all human beings. Petitioners' challenge must therefore fail.

In *Roe v. Wade*, 410 U.S. 113 (1973), a majority of this Court erroneously held that unborn children are not "persons" with rights under the fourteenth amendment to the United States Constitution, and that the fourteenth amendment includes a right to abortion. This Court should now repudiate the exclusion of unborn children from constitutional protection, and overrule *Roe v. Wade*.

The fifth and fourteenth amendments secure protection for the minimum human rights a state must respect: the rights to life, liberty, and property. These amendments would be of little value, however, if those invoking their guarantees had to bear the burden of proving their entitlement to constitutional protection. Thus, the Court must presume that these amendments apply to all living

human beings. Those who assert that a particular class of individuals is outside the scope of these amendments must bear the burden of justifying such an exclusion.

No valid basis exists for excluding human beings conceived but not yet born from the protection afforded "persons" under the Constitution.

The *Roe* Court offered no defensible justification for such an exception. The alleged absence of precedents for the personhood of unborn children is not only incorrect, but also irrelevant in view of the similar dearth of such precedents for any other class of humans. The postnatal applicability of some provisions of the Constitution referring to "persons" does not imply that those excluded, e.g., from eligibility for Congress or for citizenship, are not persons; moreover, the assertedly ambiguous scope of other constitutional provisions referring to persons provides no basis for anything but circular arguments as to their scope. The alleged inconsistency of exceptions in state anti-abortion laws with the personhood of unborn children merely identifies possible constitutional defects in those laws; such defects do not justify the categorical exclusion, from all constitutional protection, of the class suffering discrimination. The supposed laxity of state abortion legislation in much of the nineteenth century is historically misleading because it ignores the fact that stringent anti-abortion legislation, largely representing a response to the scientific discovery of the humanity of unborn children from the moment of fertilization, preceded and accompanied passage of the fourteenth amendment. Furthermore, even prior to this legislation, abortion was illegal at common law and, until after the technical developments of the late eighteenth century, practically unavailable and virtually suicidal.

Contrary to *Roe*, history, science, logic, law, and justice all weigh in favor of including unborn children within the protection of the fifth and fourteenth amendments. The framers of those amendments clearly drew no distinction between "persons" and biological "human beings." Science demonstrates that each individual member of the human race begins life at the moment of fertilization. Logic supports no essential distinction between human beings on the basis of their dwelling inside or outside the maternal womb, or

on the basis of their status as "viable" or "nonviable" individuals. Legal consistency supports the rejection of distinctions, in matters of basic rights, between born and unborn children, as well as between "viable" and "nonviable" unborn children. Finally, the intrinsic sanctity of every human life compels the rejection of any arbitrary exclusion of unborn children from entitlement to the most basic of human rights.

This Court should overrule *Roe v. Wade*. Any challenge to the federal regulations predicated upon a supposed right to abortion must accordingly fail.

A challenge to certain of the federal regulations might rest on the basis that these regulations insufficiently respect the personhood of the unborn. The petitioners have not raised or indicated any wish to raise such constitutional objections; nor would the private party petitioners likely have standing to do so. The Solicitor General of the United States and the Attorney General of the State of New York, however, who represent parties to this case, may have authority to vindicate the rights of unborn children. This Court should therefore uphold the personhood of children conceived but not yet born, and set this case for further briefing and reargument on the question of the proper disposition of this appeal.

ARGUMENT

Petitioners challenge the federal regulations at issue in this case on the basis of a supposed federal constitutional right to abortion under the fifth amendment.[1] *See* Brief for Petitioners in No. 89-1391 at 31-36; Brief for Petitioners in No. 89-1392 at 47-49. This Court has never sustained a constitutional challenge predicated

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[1] Petitioners also raise a constitutional challenge under the first amendment. This claim posits a federal constitutional right to reject eligibility criteria for government grants whenever those criteria restrict the speech of the grantee. Under this rationale, for example, government could not fund an anti-smoking campaign without allowing grantees to defend smoking, or fund a youth counseling program without allowing counselors to advocate recreational drug use or "rational" suicide. Such is obviously not the law. Government is free to subject the use of its funds to the observance of conditions — even restrictions on speech — designed to promote the effectiveness of the grant program.

upon an abortion right under the fifth amendment.[2] Petitioners' arguments therefore depend upon the wholesale incorporation of constitutional law derived from the fourteenth amendment.

The fourteenth amendment, however, contains no "right" to abort developing human offspring. On the contrary, that amendment explicitly secures the rights to life and to equal protection for every human being.

As demonstrated in this brief, the term "person" as used in the fourteenth and fifth amendments applies to all human beings, including those conceived but not yet born. Accordingly, there can be no "right" to abort such persons under either the fourteenth or the fifth amendments. Petitioners' claim predicated upon such a nonexistent "right" must fail.

I. THE BURDEN OF PROOF RESTS UPON THOSE WHO WOULD EXCLUDE UNBORN CHILDREN FROM THE MEANING OF THE TERM "PERSON" UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

The fifth amendment to the Constitution of the United States provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The fourteenth amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* amend. XIV, § 1. These amendments secure protection for the basic, minimum human rights any government must respect. It is imperative that categories of human beings not be read

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[2] With the exception of *Harris v. McRae*, 448 U.S. 297 (1980), every abortion case in this Court since *Roe v. Wade*, 410 U.S. 113 (1973), has involved state action challenged under the fourteenth amendment. In *Harris*, this Court *rejected* a challenge, under the fifth amendment, to a federal funding restriction. The Court held that the law at issue — the Hyde Amendment — "does not impinge on the due process liberty recognized in [*Roe v.*] *Wade*." *Harris*, 448 U.S. at 318 (footnote omitted). The Court did not discuss — and in light of its holding, did not need to discuss — the challengers' uncritical assumption that abortion jurisprudence under the fifth and fourteenth amendments is essentially equivalent.

out of the terms of these amendments without the clearest demonstration of justification for such exceptions.

The Constitution is not a legislative code designed to specify its application in every conceivable situation. "We do not expect to find in a constitution minute details. It is necessarily brief and comprehensive. It prescribes outlines, leaving the filling up to be deduced from the outlines." *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 532 (1870). Thus, the vitality of constitutional principles depends upon their being presumed to apply. "A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance." *Boyd v. United States*, 116 U.S. 616, 635 (1886).

If there were ever a term whose scope must be presumed to be broad, it is the term "person." For whoever is not a person lacks not only the privileges of citizenship, but even the barest minimum of human rights. A person need not have every right — prisoners, minors, and aliens, for example, do not possess the full panoply of rights and privileges afforded under the Constitution — but a non-person has *no* rights whatsoever. A non-person is no better off than property, entirely subject to the whim of the owner and whatever permissible regulation the government may deign to impose.

The constitutional protection for "persons" simply cannot function if each individual or class of human beings must prove inclusion in the roll of "persons." Does the term "person" include mentally disabled individuals? There is not likely much, if any, explicit support for that particular proposition in the text, history, or early application of the fifth and fourteenth amendments. Yet these are certainly persons. Does "person" include citizens of hostile nations? Children under the age of eighteen? Convicted misdemeanants or felons? Comatose individuals? Each of these classes of human beings lacks either the legal or physical ability to exercise certain rights, yet each is unquestionably a class of persons. This is so, not because members of each class can *prove* their inclusion under the fifth and fourteenth amendments, but because they are *presumed* included absent decisive contrary proof. "They are humans, live, and have their being." *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (discussing illegitimate children). Therefore, "[t]hey are

clearly 'persons' " within the meaning of the Constitution. *Id.*

Human offspring conceived but not yet born are likewise "humans, live, and have their being." They are "a form of human life," *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3058 (1989) (plurality opinion), as are infants, toddlers, teens, adults, and the elderly. As human beings, prenatal children do not need to overcome any additional hurdles in order to establish their right to presumptive inclusion within the term "person" as used in the Constitution. If unborn children are not persons, it must be because some further evidence authoritatively rebuts this presumption. No such evidence exists.

II. THERE IS NO JUSTIFICATION FOR EXCLUDING FROM THE TERM "PERSON" THE CLASS OF HUMAN BEINGS CONCEIVED BUT NOT YET BORN.

In *Roe v. Wade*, 410 U.S. 113, 158 (1973), a majority of this Court read into the term "person" in the fourteenth amendment an exception for unborn children. There is no valid justification for the creation of such an exception.

A. *Roe v. Wade* Gave No Valid Basis for Creating an Exception for Unborn Children.

The *Roe* Court made several arguments to support its conclusion that the word "person" does not include the unborn. None of these arguments withstands analysis.

1. Alleged absence of precedent

First, the Court observed that "no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment." *Roe v. Wade*, 410 U.S. at 157.

This observation is factually incorrect. In *Steinberg v. Brown*, 321 F. Supp. 741 (N.D. Ohio 1970) (three-judge court), the court rejected a challenge to Ohio's abortion laws, holding that the implied right to privacy

> must inevitably fall in conflict with the express provisions of the Fifth and Fourteenth Amendments that no *person* shall be deprived of life without due process of law. The difference between this case and *Griswold* [overturning a ban on the use of contraceptives] is clearly apparent, for *here there is an embryo or fetus* incapable of protecting itself.

Id. at 745-46 (emphasis added). As the court in *Steinberg* explained, "a new life comes into being with the union of human egg and sperm cells," *id.* at 746, and "[o]nce human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state a duty of safeguarding it," *id.* at 746-47.

Moreover, as a legal matter, an absence or dearth of case support for unborn personhood is irrelevant. There may well not be any cases, for example, holding newborn infants to be persons. This obviously does not mean, however, that such children are beyond the scope of the fourteenth or fifth amendments. As discussed above, such a cramped construction of the text would largely negate the effect of these amendments.

2. Postnatal application of other constitutional provisions

Second, the Court noted that the use of the word person in "nearly all" other parts of the Constitution "is such that it has application only postnatally. None [of these uses] indicates, with any assurance, that it has any possible prenatal application." *Roe*, 410 U.S. at 157 (footnote omitted). But this simply begs the question. Those provisions that *cannot* apply prenatally explicitly limit the class of human beings to which they apply, *e.g.*, U.S. Const. art. I, § 2, cl. 2 (person must be at least age twenty-five to be a Representative); *id.* art. I, § 3, cl. 3 (person must be at least age thirty to be a Senator); *id.* amend. XIV, § 1 (person who is born, if born in the United States, is a citizen). Such exclusions obviously do not imply that those excluded (e.g., with respect to Representatives, those under age twenty-five) are not persons. Moreover, those provisions — like the fifth and fourteenth amendments — that *can* apply to unborn children,[3] *e.g.*, *id.* art. I, § 9, cl. 1 (tax on importa-

[3] It bears mention that the holding of an office need not, in theory, be limited to competent adults. History, for example, has seen numerous infants wear the royal crown. Furthermore, unborn children have been explicitly recognized as capable of serving as the executor of an estate. H.

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tion of "persons"); *id.* amend. IV (security of the person against unreasonable searches and seizures), contain no exclusion for any particular class of children, born or unborn. Again, the burden is on those who would create an exception, not those who claim inclusion.

3. Apparent inconsistency of state anti-abortion laws with personhood of unborn children

Third, the Court pointed to allegedly fatal inconsistencies in the abortion laws of Texas and other states.

> [I]f the fetus is a person who is not to be deprived of life without due process of law, . . . does not the Texas exception [for abortion necessary to save the life of the mother] appear to be out of line with the Amendment's command? . . .
>
> . . . If the fetus is a person, why is the woman not a principal or an accomplice [to an unlawful abortion]? . . . If the fetus is a person, may the penalties be different [for abortion and first degree murder]?

Roe, 410 U.S. at 157 n.54.

Here the *Roe* Court confused two distinct issues: the constitutionality of the Texas abortion laws, and the constitutional personhood of unborn children.

The government, of course, may not exclude from the general protection of the criminal law a particular class of innocent persons.[4] *See infra* p. 25. This fundamental obligation does not disappear simply because the government fails to comply with it. In *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), for example, it would have been outrageous to suggest that the long history and widespread practice of segregated public education meant that black people were not persons. On the contrary, this segregation represented a constitutional violation.

Similarly, the denial of equal statutory treatment to unborn children does not support a categorical denial of constitutional protection to such children. As the Court emphasized in *Brown v. Board of Education*, 349 U.S. 294, 300 (1955) (*Brown II*), "the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." If the state or federal government in fact denies due process or equal protection to a class of humans, the remedy is to declare the discrimination unconstitutional, not to deny the personhood of the victimized class. To hold otherwise would be to deny the possibility of unconstitutional action by government, and to turn civil rights litigation upside down.

4. Alleged laxity of nineteenth century abortion laws

Fourth, the Court cited its "observation" that "throughout the major portion of the 19th century prevailing legal abortion practices were far freer" than in 1973, *Roe*, 410 U.S. at 158, presumably as evidence that the framers and those who ratified the fourteenth amendment did not regard unborn children as human persons.

Storer, *Criminal Abortion in America* 92 (1860) ("an infant in utero . . . at every stage of [gestation], no matter how early, . . . may be appointed executor . . . "). *Accord Thellusson v. Woodford*, 31 Eng. Rep. 117, 163 (Ch. 1798).

[4] Whether an exception for the life of the mother would entail a denial of equal protection would depend upon the scope of that exception. There is a grave moral and legal difference between, on the one hand, allowing a physician to remove an ectopic pregnancy or cancerous uterus from a pregnant woman, with the death of her unborn child occurring as an unintended effect of that necessary operation, and, on the other hand, giving permission for the direct, intentional killing of the unborn child whenever such is claimed to be necessary to save the mother's life.

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The total exemption of the pregnant woman herself from the scope of criminal prohibitions against abortion would, like total parental immunity from prosecution for serious child abuse, be unconstitutional. *But cf. Michael M. v. Superior Court*, 450 U.S. 464 (1981) (sustaining, against equal protection challenge, statutory rape law that only applied to male offenders). Prosecutorial discretion, of course, is fully capable of handling situations in which the mother is more accurately considered a victim instead of an offender.

The primary effect of holding the unborn child to be a person would be that the child could no longer be regarded as beyond the equal protection of the criminal law. In other words, if all of the elements of a statute defining an offense against a person were satisfied, the statute could not be held inapplicable simply because the victim was not yet born.

The state may properly create a separate and additional offense of abortion which could apply without proof of pregnancy or causation of fetal death.

On this point the *Roe* opinion refutes itself. The fourteenth amendment was adopted in 1868, precisely the time when the scientific discovery of the humanity of the unborn had become widely known, and precisely at the time when this discovery prompted vigorous opposition to abortion by means of numerous statutory bans. *See* 410 U.S. at 129 (observing that abortion laws in effect in 1973 "derive from statutory changes effected, for the most part, in the latter half of the 19th century"); *id.* at 141 (noting the "anti-abortion mood prevalent in this country in the late 19th century"); *id.* at 141-42 (noting that the concern of the medical profession for prenatal human life destroyed by abortion "may have played a significant role in the enactment of stringent criminal abortion legislation during that period"); *see also id.* at 174-77 (Rehnquist, J., dissenting) (noting the multiplicity of state and territorial anti-abortion laws at the time of the adoption of the fourteenth amendment).

Furthermore, the assumption by the *Roe* Court that abortion was freely and legally available, even in the early part of the nineteenth century, simply ignores reality. As Professor Joseph W. Dellapenna has demonstrated, the primitive state of medical technology meant that, prior to the late eighteenth century, abortion techniques were either ineffective or so dangerous as to be practically suicidal. Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359, 371-76 (1979). Thus, while abortion was indeed unlawful at common law, prosecutions were infrequent because they were unnecessary. Dellapenna, "Abortion and the Law," in *Abortion and the Constitution* 137, 146 (D. Horan, E. Grant & P. Cunningham eds. 1987).

> During this period, techniques to induce abortions were either magical, and hence punishable as witchcraft (whether they were successful or not), or extremely crude invasions of the woman's body, likely to be fatal to the woman as well as to the fetus. In the few cases where an abortionist was punished, it was for killing the mother. In fact, there is no evidence of voluntary abortion during this time. Abortions, if they occurred, seem to have resulted from assaults upon women rather than by their choice. Even then, abortion prosecutions were hampered

> by ignorance of medical knowledge about the gestation process. The net result of these circumstances was that abortion was rare and the law did not have to deal with it because hanging the abortionist for killing the mother was sufficient punishment for the few cases that did arise.

Id. at 145 (footnotes omitted). The disposal of "unwanted" children was effectuated instead by infanticide. *Id.* (citing numerous authorities). When new abortion techniques finally became available in the late eighteenth century, the result was the initiation of anti-abortion legislation. *Id.* at 146.[5] This legislative movement subsequently expanded in response to embryological discoveries that identified fertilization as the beginning of human life. *Id.* at 147.

B. No Other Basis Exists For Creating an Exception for Unborn Children.

Roe failed to give any justification for reading an exception for unborn children into the scope of the term "person" as used in the fourteenth (or fifth) amendment. Nor does any valid justification appear from other sources. On the contrary, history, science, logic, law, and justice all militate against the imposition of any such arbitrary limitation on personhood as birth or viability.

1. The framers of the fourteenth amendment did not distinguish between "human beings" and "persons."

Roe v. Wade distinguished between human beings and persons, holding that unborn children were not persons even if they were human beings. 410 U.S. at 159 ("We need not resolve the difficult question of when life begins"). Such a distinction, however, was foreign to the men who proposed and adopted the fourteenth amendment.[6]

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[5] Thus, it would also be nonsensical to claim that women had a legal "liberty to abort" during the period preceding enactment of the fifth amendment.

[6] The same conclusion applies to the framers of the fifth amendment. The founding fathers considered even slaves to be persons. *See* U.S. Const. art. I, § 2, cl. 3 (distinguishing between "free Persons" and "other Persons" for purposes of apportionment of taxes and legislators). There is no reason to believe that these same men, when adding the fifth amend-

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If one thing is overwhelmingly clear from the record of the debates leading up to and surrounding the thirteenth and fourteenth amendments and the post-war civil rights legislation, it is that the legislators considered personhood and biological humanity to be interchangeable terms.

Thus Representative Thaddeus Stevens, on the day the thirteenth amendment was declared ratified, proclaimed:

> This is man's Government; the Government of all men alike; not that all men will have equal power and sway within it. Accidental circumstances, natural and acquired endowment and ability, will vary their fortunes. But equal rights to all the privileges of Government is innate in every immortal being, no matter what the shape or color of the tabernacle which it inhabits.

Cong. Globe, 39th Cong., 1st Sess. 74 (1865) (emphasis added).

Likewise Representative John A. Bingham, author of section one of the fourteenth amendment, declared in reference to the fifth amendment the principle he viewed as fundamental:

> [T]he Constitution of the United States . . . declared that "no person shall be deprived of life, liberty, or property without due process of law." By that great law of ours it is not inquired whether a man is "free" by the laws of England; it is only to be inquired *is he a man*, and therefore free by the law of that creative energy which breathed into his nostrils the breath of life, and he became a living soul, endowed with the rights of life and liberty . . . Before that great law *the only question to be asked of a creature claiming its protection is this: Is he a man?* Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal.

Cong. Globe, 40th Cong., 1st Sess. 542 (1867) (emphasis added).

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ment, denied the personhood of certain human beings. Indeed, the framers of the fourteenth amendment, who clearly repudiated the notion of a distinction between "persons" and "human beings," *see infra*, saw their work as the vindication, not the rejection, of the political theory of the framers of the Bill of Rights.

Representative James S. Brown, similarly, denied the notion that personhood required something more than human life.

> [D]oes the term "person" carry with it anything further than a simple allusion to the existence of the individual? It certainly cannot be strained into any recognition of slavery, since the very recognition of personality excludes [an institution which] does not regard its victims as persons but as chattels.

Cong. Globe, 38th Cong., 1st Sess. 1753 (1864).

Indeed, examples are legion to demonstrate the basic assumption of the framers and their contemporaries that "in the eyes of the Constitution, every *human being* within its sphere . . . from the President to the slave, is a *person.*" Cong. Globe, 37th Cong., 2d Sess. 1449 (1862) (Sen. Sumner) (first emphasis added).[7]

There is, therefore, no warrant for the conclusion that a class of human beings might be excluded from the persons protected under the fourteenth (or fifth) amendment. As forcefully stated by Representative Joshua R. Giddings,

> Our fathers, recognizing God as the author of human life, proclaimed it a "self-evident" truth that every human being holds from the Creator an inalienable right to live . . . .
>
> . . . If this right be denied, no other can be acknowledged. If there be exceptions to this central, this universal proposition, that *all* men, without respect to complexion

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[7] *E.g.*, Cong. Globe, 39th Cong., 1st Sess. 77 (1866) (Sen. Trumbull) ("any legislation or any public sentiment which deprives any human being in the land of those great rights of liberty will be in defiance of the constitution"); *id.* at 322-23 (1866) (Sen. Trumbull) ("great object of securing to every human being within the jurisdiction of the Republic equal rights before the law"); *id.* at 1159 (1866) (Rep. Windom) (rights to life, liberty, and pursuit of happiness are "rights of human nature," and the most basic "right of human nature [is] the right to exist"); *id.* at 1151 (1866) (Rep. Thayer) ("relief of human nature" secured in thirteenth amendment); 3 Cong. Rec. 1794 (1875) (Senator Allen G. Thurman) (may not deny equal protection to "any person" in the jurisdiction, "be he sane or be he insane, *be he old or be he young*, be he innocent or be he criminal, be he learned or be he ignorant") (emphasis added).

> or condition, hold from the Creator the right to live, who shall determine what portion of the community shall be slain? And who may perpetrate the murders?

Cong. Globe, 35th Cong., 1st Sess. App. 65-66 (1858) (emphasis in original).

2. Science rejects the exclusion of unborn children from the class of human beings.

Science does not purport to identify the value society should place upon human life. Science does indisputably show, however, that each individual human organism begins life at the moment of fertilization. Thus science offers no valid basis for excluding prenatal human life from the category of "persons" protected under the Constitution.

> However one answers the metaphysical or theological question whether the fetus is a "human being" or the legal question whether it is a "person" as that term is used in the Constitution, one must at least recognize, first, that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species homo sapiens and distinguishes an individual member of that species from all others, and second, that there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being.

Thornburgh v. American College of Obstets. & Gynecs., 476 U.S. 747, 792 (1986) (White, J., joined by Rehnquist, J., dissenting).

This principle of continuous development is not unique to human beings.

> In biology and in medicine, it is an accepted fact that the life of *any* individual organism reproducing by sexual reproduction begins at conception, or fertilization — the time when the egg cell from the female and sperm cell from the male join to form a single new cell, the zygote. The zygote is the starting cell of the new organism.
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> . . . It is important to also remember . . . . that like begets like. In other words, the zygote is always a member of the biological species of its parents from the time

> of fertilization throughout all of its life, before as well as after birth. No study or experiment has ever refuted these scientific facts, and no competent scientist denies them.

The Human Life Bill: Hearings on S.158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 14, 16 (1982) (testimony of Dr. Micheline Mathews-Roth, principal research associate, Dept. of Medicine, Harvard Medical School) (emphasis added). The conclusion in the case of human life rests, therefore, not only upon human embryological research, but upon the findings of a broad area of biological study.

> So, therefore, it is scientifically correct to say that an individual human life begins at conception, when egg and sperm join to form the zygote, and that this developing human always is a member of our species in all stages of its life.

Id. at 17. *Accord* W. Hamilton & H. Mossman, *Human Embryology* 14 (4th ed. 1972) ("the fusion of two germ cells . . . one, the spermatozoan from the male parent; the other, the ovum from the female parent . . . is the formation of the first cell of the new individual, the zygote"); L. Arey, *Developmental Anatomy* 55 (7th ed. 1974) (union "of a male and female sex cell . . . definitely marks the beginning of a new individual"); K. Moore, *The Developing Human: Clinically Oriented Embryology* 1 (2d ed. 1977) (a zygote "results from fertilization of an oocyte by a sperm and is the beginning of human life").[8]

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[8] *See also Corkey v. Edwards*, 322 F. Supp. 1248 (W.D.N.C. 1971), *vacated*, 410 U.S. 950 (1973):

> During fertilization, sperm and egg pool their nuclei and chromosomes. Biologically, a living organism belonging to the species homo sapiens is created out of this organization. Genetically, the adult man was from such a beginning all that he essentially has become in every cell and human attribute.

322 F. Supp. at 1252 (citations omitted). *Accord Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217, 1223 (E.D. La. 1970), *vacated*, 412 U.S. 902 (1973); *Steinberg v. Brown*, 321 F. Supp. 741, 746-47 (N.D. Ohio 1970) (three-judge court); *Presley v. Newport Hosp.*, 117 R.I. 177, ___, 365 A.2d 748, 751 (1976).

Science cannot identify a spiritual soul or assign a moral value to a given creature. Science does identify individual members of a particular species, such as homo sapiens. Unborn children are unquestionably individual members of this species, and thus the conclusions of science utterly reject the arbitrary exclusion of prenatal humans from the term "person."

3. Logic militates against the creation of an exception for unborn children in the term "person."

According to *Roe v. Wade*, unborn children are non-persons, and aborting such children is a constitutional right. But it is plainly absurd to draw so tenuous a border as birth (or, for that matter, viability) between what is a constitutional liberty and what is homicide.

First of all, the act of abortion itself cannot sensibly be what distinguishes between persons and non-persons. Presumably no member of this Court would deny that "a newborn infant, whether the product of a normal birth or an abortion," *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476, 503 n.10 (1983) (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting), is a person under the fifth and fourteenth amendments.

The point of detachment from the mother — whether by normal birth, induced delivery, or abortion — likewise fails as a logical point for creating an exception to personhood. For a considerable period prior to birth, the unborn child is viable, and thus capable of surviving premature delivery. The child of seven or eight months' gestation who still resides in the maternal womb is essentially indistinguishable from the child of identical age who has been born prematurely.

The fourteenth amendment does distinguish between born and unborn children of the same age for purposes of citizenship. *See* U.S. Const. amend. XIV, § 1 ("persons born . . . in the United States . . . are citizens"). But citizenship is a political classification the boundaries of which are necessarily arbitrary.

Personhood, in contrast, entitles an individual to the basic, minimal protections accorded to humanity. Whether the mother in

labor while traveling interstate gives birth in Texas today or Mexico tomorrow is a question with political ramifications for the child; such incidental details, however, cannot reasonably determine whether the child may be slain. "No governmental power exists to say that a viable fetus should not have every protection required to preserve its life." *Thornburgh*, 476 U.S. at 784 (Burger, C.J., dissenting). As Senator Arthur S. Boreman explained in regard to the then recently enacted protections of the fourteenth amendment:

> This . . . is not confined to citizens of the United States, but it includes every person that is found within these States, and guaranties to all life, liberty, and property, and equal protection of the laws. . . . It is not restricted to guarantying the right of a "citizen" . . . but it extends to every "person," whether he has come from another State or not, to *every person residing anywhere, everywhere*, within the United States. So that while, before this amendment, if there was any question whether there were *any class of persons* in this country over whom the protection of the Constitution of the United States was not extended, there cannot now be any longer any question on that subject.

Cong. Globe, 42nd Cong., 1st Sess. App. 229 (1871) (emphasis added).

The total meaninglessness of birth as a criterion for personhood is more apparent today than ever, when induced, "scheduled" deliveries are commonplace, when babies are removed from the womb for surgery and then replaced within their mothers, and when irremediably harmed mothers are sustained on life support systems solely to await the delivery of the uninjured child within the womb. [9] Birth changes *where* the person is, not *what* the person is.

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[9] Already *in vitro* fertilization and embryonic transfer have demonstrated beyond all doubt the fundamental biological independence of the newly conceived child from any particular woman, genetic mother or not, and the capacity of an unborn child to live outside of the womb altogether, if only for the initial stages of development. It is now clear, in other words, that intrauterine gestation is not even the first stage of life, but is merely an intermediate stage subject to technical manipulation regarding both its duration and the identity of the woman who bears the child.

Nor does the concept of viability supply a logical alternative to birth as a boundary for excluding some unborn children from personhood.

> If we profess allegiance to reason, it would be seditious to adopt so arbitrary and uncertain a concept as viability as a dividing line between those persons who shall enjoy the protection of our remedial laws and those who shall become, for most intents and purposes, nonentities. It seems that if live birth is to be characterized, as it so frequently has been, as an arbitrary line of demarcation, then viability, when enlisted to serve that same purpose, is a veritable *non sequitur.*

Presley v. Newport Hosp., 117 R.I. 177, ___, 365 A.2d 748, 754 (1976).

Members of this Court have already strongly criticized reliance upon the concept of viability for drawing constitutional lines. *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3057 (1989) (plurality opinion). *See, e.g., City of Akron v. Akron Center for Reprod. Health, Inc.*, 462 U.S. 416, 456-58 (1983) (O'Connor, J., joined by White and Rehnquist, JJ., dissenting) (point of viability is unstable because tied to contemporaneous state of medical technology, and is therefore unsuitable as a basis for judicial decision making). Justice White, in his dissent in *Thornburgh*, elaborated upon this point with regard to the state interest in protecting human life:

> The government interest at issue is in protecting those who will be citizens if their lives are not ended in the womb. The substantiality of this interest is in no way dependent on the probability that the fetus may be capable of surviving outside the womb at any given point in its development, as the possibility of fetal survival is contingent on the state of medical practice and technology, factors that are in essence morally and constitutionally irrelevant. The State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom. Accordingly, the State's interest, if compelling after viability, is equally compelling before viability.

476 U.S. at 795 (White, J., joined by Rehnquist, J., dissenting) (footnote omitted). The same rationale applies to constitutional personhood, i.e., the claim to minimal protection of basic human rights. One's capacity for survival is "constitutionally irrelevant" because "the character of the entity does not change at the point of viability."

The very notion of viability as a criterion for denying legal protection is gravely flawed. Viability is not a transcendent concept — it refers to conditional circumstances. The Arctic explorer is viable *if* sufficiently clothed. The serious diabetic is viable *if* properly treated. The newborn, full-term infant is viable *if* fed and nurtured. And the unborn child is viable *if* not prematurely expelled from the necessary environment, be it a petri dish or a womb. To deny protection on the basis of one's need for protection is no more sensible than to deny those who cannot swim the right to stay on board a ship. *Roe* stripped protection from precisely those who most need the minimum safeguards of the Constitution. This is topsy-turvy jurisprudence.

4. Legal consistency would not be served by the exclusionof unborn children from the protection of the fifth and fourteenth amendments.

The integrity of the law is not served, but rather is harmed, by the arbitrary exclusion of unborn children from constitutional protection. The history of legal developments of the past century and a half regarding prenatal human life has been a history of increasing recognition and protection of unborn children. The creation of an exception to the fourteenth or fifth amendment which would deny protection to such children represents a reversion to outmoded and unworkable legal fictions, and leads to disrespect for the law.

The ordinary legal guardians of the civil rights to life, liberty, and property are the criminal law and the law of torts. In both of these areas of law, courts and litigants have struggled with, and to a certain extent overcome, the absurdity and injustice of arbitrary distinctions between born and unborn children, and between viable and nonviable unborn children.

The common law is considerably older than contemporary

knowledge of prenatal human development. Ignorance of fertilization and the nature of the human embryo consequently left its marks on the common law. In particular, the considerable problems of proof facing those alleging the perpetration of wrongs against unborn children led to the recognition of various arbitrary rules. These rules, for want of better guides, tied civil and criminal liability to observable phenomena such as quickening (the detection of the child moving in the womb) and live birth.

The criminal law has found it difficult to "outgrow" these arbitrary rules, presumably because of a combination of stare decisis, concern for advance notice to defendants of the criminality of particular conduct, and the rule of strict construction in favor of the defendant. *E.g., Keeler v. Superior Court*, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970) (en banc). As a result, the general rule today remains that the homicide of an unborn child cannot be established without proof that the mortally wounded infant survived, even if only momentarily, outside the womb. *See* Annotation, *Homicide Based on Killing of Unborn Child*, 40 A.L.R.3d 444 (1971). States have responded to this archaic requirement, however, by amending their criminal codes and specifying that the destruction of an unborn child is a crime.[10]

The law of torts has demonstrated a greater ability to "keep pace with the sciences," *Bonbrest v. Kotz*, 65 F. Supp. 138, 143

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[10] *E.g.*, Cal. Penal Code § 187 (West 1988) (murder); Ill. Ann. Stat. ch. 38, paras. 9-1.2, 9-2.1, 9-3.2 (Smith-Hurd Supp. 1990) (homicide and manslaughter of unborn child); La. Rev. Stat. Ann. §§ 32.5-32.8 (West Supp. 1990) (feticide); Minn. Stat. Ann §§ 609.2661-609.2665, 609.268 (West 1987 & Supp. 1990) (murder, manslaughter, and felony death of unborn child); N.D. Cent. Code §§ 12.1-17.1-02 to 12.1-17.1-04 (Supp. 1989) (murder, manslaughter, and negligent homicide of unborn child).

One of the curious consequences of the difficulties in proving destruction of unborn children was that the lives of such children could better be protected by laws prohibiting abortion *without* proof of pregnancy, destruction of the unborn child, or intent to destroy such child. The American Medical Association incorporated precisely these features in its model anti-abortion statutes in the nineteenth century. *See* 13 Transactions of the American Medical Association 41-42 (1860); H. Storer, *Criminal Abortion in America* 94, 97-100 (1860).

(D.D.C. 1946) (allowing action for prenatal injuries), and to adjust its rules of liability in the face of increased scientific knowledge. Thus, for example, the courts have overwhelmingly recognized the right of a live child to recover for prenatal injuries, even if inflicted prior to viability. Annotation, *Liability for Prenatal Injuries,* 40 A.L.R.3d 1222 (1971). Likewise, the courts universally allow recovery for the wrongful death of a child born alive whose injuries were inflicted before birth. Annotation, *Right to Maintain Action or to Recover Damages for Death of Unborn Child,* 84 A.L.R.3d 411 (1978). Similarly, after a protracted struggle over the issue, the courts of a clear majority of jurisdictions — thirty-four states including the District of Columbia, with eleven opposed, and six undetermined — now allow recovery for the wrongful death of a viable unborn child who dies while still in the womb. *Id.*[11] And while few courts have addressed the issue, already one state supreme court has convincingly argued that wrongful death liability cannot sensibly be limited to wrongs inflicted upon viable unborn children. *Presley v. Newport Hosp.*, 117 R.I. 177, 365 A.2d 748 (1976).

Roe's imposition of birth and viability requirements (as predicates for personhood and a compelling state interest in protecting prenatal life, respectively) therefore represented a major setback in the law. *Roe* embraced the very same distinctions that the law of torts (and, to a lesser extent, crimes) was in the process of finally and completely repudiating.

The consequences in terms of respect for the law are all too obvious. The jealous ex-husband who forcibly aborts his pregnant ex-wife's child may be convicted of homicide, but the professional abortionist cannot be. A woman who is hit by a car and miscarries on the way to an abortion business may sue for the loss of the child she planned to destroy. A disabled child may recover large sums to compensate for harm suffered in the womb, but the mother could have had that same child killed because she did not want a handicapped baby.

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[11] One additional state, Tennessee, has legislated this result. *See* Tenn. Code Ann. § 20-5-106 (1980) (legislatively overruling *Hamby v. McDaniel*, 559 S.W.2d 774 (Tenn. 1977)). Thus, thirty-five jurisdictions now allow recovery, while ten deny recovery.

Such contrasts make a mockery of the law. The malleable and uncertain lines separating viability from nonviability, or prematurity from pregnancy, simply cannot support the difference between constitutional rights and crimes. The shifting sands of consent to abortion cannot support the distinction between homicidal torts and constitutional liberties.

Either the unborn child is a person, or he is not. While the law in theory can consider someone a person for some purposes and not for others, in practice such artificiality results in contempt for a legal system full of technicalities that contradict reality. The integrity of the legal system calls for inclusion, not exclusion, of the class of unborn children within the term "person" in the fifth and fourteenth amendments.

5. Justice demands the inclusion of unborn children within the term "person."

Finally, considerations of justice call for the renunciation of the arbitrary denial of equal protection to children who happen to reside within their mothers' wombs.

Not everyone has *every* right. But no one except a person has *any* rights. Thus *Roe v. Wade* asked the wrong question when it queried whether unborn children were "recognized in the law as persons in the whole sense," 410 U.S. at 162. The issue is not whether children conceived but not yet born should receive the full range of the rights of citizenship, such as the right to vote, but whether they may lay claim to the barest minimum of human rights: "the right to *survive* on a basis of equality with human beings generally," *Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217, 1226 (E.D. La. 1970) (emphasis added), *vacated*, 412 U.S. 902 (1973). The law prior to *Roe* had generally accorded that much recognition, and more, to the child in the womb. And in so doing the law recognized a difference in kind between unborn children and tonsils, worms, or trees. This difference is the difference of personhood.

This difference, then, relates to "our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty." *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2708 (1990) (internal quotation marks and citation omitted). Personhood is what characterizes the coiiection of diverse entities that together compose the human race.

As Justice Brennan put it in another context,

> At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death.

Furman v. Georgia, 408 U.S. 238, 296 (1972) (Brennan, J., concurring) (overturning Georgia death penalty). If this observation holds true with regard to the life of a convicted felon, it is much more so for the innocent baby growing in the womb.

The answer to the fundamental moral issue, moreover, is clear: society "must treat its members with respect for their intrinsic worth as human beings," for "if the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life and brutalize our values." *Id.* at 270, 303 (Brennan, J., concurring).

Justice Harlan, dissenting in *Poe v. Ullman*, 367 U.S. 497 (1961), emphasized the central role of tradition and history in the interpretation of the Constitution. "A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound." *Id.* at 542 (Harlan, J., dissenting).

Roe v. Wade represents precisely such a radical departure from the history, indeed the founding principles, of this nation. Like *Betts v. Brady*, 316 U.S. 455 (1942), overruled in *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Roe* "made an abrupt break" with what "seems to us to be an obvious truth," *Gideon*, 372 U.S. at 344: "We hold these truths to be self-evident: that *all* men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are *Life*, Liberty, and the pursuit of Happiness." The Declaration of Independence para. 2 (U.S. 1776) (emphasis added).

The fifth and fourteenth amendments represent an "assurance

. . . that no man shall ever, in the coming future, as long as the Republic stands . . . be deprived of his life, of his liberty, or his property without due process of law." Cong. Globe, 37th Cong., 2d Sess. 1640 (1862) (Rep. Bingham). As this Court explained in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943), the "very purpose" of a constitutional declaration of rights

> was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life . . . and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.

Roe v. Wade created an exception to personhood where none existed or could exist. This Court should now correct this fundamental injustice by overruling *Roe v. Wade* and upholding the right to life and equal protection of all human beings, regardless of age, size, health, or condition of dependency.

III. THE PERSONHOOD OF UNBORN CHILDREN REQUIRES THE REJECTION OF PETITIONERS' ATTACK UPON THE FEDERAL REGULATIONS.

The constitutional personhood of human beings conceived but not yet born dictates the rejection of the petitioners' constitutional challenge to the federal regulations at issue here.

Petitioners predicate their challenge upon an alleged "right . . . to have an abortion," Brief for Petitioners in No. 89-1392 at 47 (internal quotation marks and citations omitted). Such a "right," however, is fundamentally inconsistent with the right to life of persons conceived but not yet born. A "right" to abort, where the life of an unborn person is at stake, would make no more sense than "a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body," *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2342 n.4 (1989) (plurality opinion). As this Court acknowledged in *Roe*, "[i]f this suggestion of personhood is established, the [challengers'] case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Constitution]." 410 U.S. at 156-57.

The personhood of unborn children imposes a duty upon the

state to afford equal protection to humans conceived but not born. *Cf. DeShaney v. Winnebago Dep't of Social Servs.*, 109 S. Ct. 998, 1004 n.3 (1989) ("the State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause") (citation omitted). As Justice Stevens observed in the *Thornburgh* case, unless there is a "fundamental" difference between unborn and born human offspring, "the permissibility of terminating the life of the fetus could scarcely be left to the will of the state legislatures." 476 U.S. at 779 (footnote omitted). *See also Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841, 2863 (1990) (Scalia, J., concurring) ("Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me"). Furthermore, "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (footnote omitted). [12] Thus, in view of the general prohibition of homicide, a proper litigant could challenge the constitutionality of laws which did *not* provide at least the minimum equal protection demanded by the fifth and fourteenth amendments: the outlawing of all abortions.

Petitioners have not challenged the federal regulations on this basis. Nor have they indicated any desire to do so. Moreover, it is far from clear that the private petitioners, who are not guardians of unborn children, and whose interests are manifestly opposed to those of such children, have standing to raise objections predicated upon the personhood of the unborn. The United States and the State of New York, however, each of which is either nominally or practically a party to this case, are proper parties to seek vindication of the rights of unborn persons. This Court should therefore hold that

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[12] The fourteenth amendment contains an explicit guarantee of equal protection. The fifth amendment, while lacking the precise phrase, nevertheless also "contains an equal protection component." *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 542 n.21 (1987) (citation omitted). "This Court's approach to Fifth Amendment equal protection claims has . . . been precisely the same as to equal protection claims under the Fourteenth Amendment." *Id.* (internal quotation marks and citations omitted). *Accord Regan v. Taxation with Representation*, 461 U.S. 540, 542 n.2 (1983).

the fifth and fourteenth amendments protect unborn children as persons, and set this case for further briefing and reargument on the question of the proper disposition of this particular appeal. [13]

This Court followed a similar course in the school desegregation cases. In *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), this Court declared that racial segregation in public education violated the fourteenth amendment. The Court then set further proceedings to consider the implications of *Brown I* for the resolution of the particular cases before it. *See Brown v. Board of Educ.*, 349 U.S. 295, 298-99 (1955) (*Brown II*). Recognition of the constitutional rights of unborn children would, like the holding in *Brown I*, represent a very significant vindication of fundamental human rights. Thorough review of the ramifications of this holding, as well as the proper means of upholding these rights in the case at bar, would therefore be wise.

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[13] Most of the challenged federal regulations, viewed in light of the personhood of unborn children, are clearly constitutional. These regulations merely impose operating standards upon federal grantees in a manner wholly consistent with the constitutional rights of unborn persons.

On the other hand, regulations which authorize any abortions would violate the fifth amendment. Any allowance of intentional destruction of unborn persons denies equal protection to such persons. *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1004 n.3 (1989).

Some of the challenged regulations might be construed to authorize abortions. *E.g.*, 42 C.F.R. § 59.8(a)(2) (1989) ("emergency care"); *id.* § 59.8(b)(6) ("oral contraceptives," which could be interpreted to include non-contraceptive abortifacients). If these regulations were to be construed to authorize abortions, they would be unconstitutional. On the other hand, these regulations could be construed not to apply to abortions, or to apply only to such abortions as are independently authorized under other provisions of law. Under the first interpretation, the regulations would be constitutionally unobjectionable. Under the second interpretation, the challenged sections would in themselves pose no threat to the constitutional rights of unborn persons. Once laws permitting or authorizing abortions gave way to recognition of the constitutional rights of unborn persons to life and to equal protection, laws merely assuming the legality of abortion would become, as applied to abortion, dead letters. Thus, alternative constructions are readily available which save, from facial unconstitutionality, the challenged regulations. *United States v. Salerno*, 481 U.S. 739, 745 (1987) (constitutional challenge must establish that no set of circumstances exist under which statute is valid).

CONCLUSION

There is no valid basis for excluding unborn children from the fundamental protections afforded all persons under the fifth and fourteenth amendments to the United States Constitution. This Court should therefore overrule *Roe v. Wade*, 410 U.S. 113 (1973), and set this case for further briefing and reargument on the issue of the proper disposition of this appeal.

Respectfully submitted,

Of Counsel:

CHARLES E. RICE
Notre Dame Law School
Notre Dame, IN 46556

MICHAEL J. LAIRD
608 S. Walnut Street
Arlington Heights, IL 60006

THOMAS PATRICK MONAGHAN
JAY ALAN SEKULOW
WALTER M. WEBER
(Counsel of record)
C. PETER THOMAS S. CORNELL
JAMES E. MURPHY
Free Speech Advocates
6375 New Hope Road
New Hope, KY 40052
(502) 549-5454

THOMAS A. GLESSNER
Christian Action Council
101 W. Broad St., Suite 500
Falls Church, VA 22046
Attorneys for Amici Curiae

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IN THE

Supreme Court of the United States

October Term, 1990

DR. IRVING RUST, et al., *Petitioners*,

v.

LOUIS W. SULLIVAN, Secretary of Health and Human Services

THE STATE OF NEW YORK, et al., *Petitioners*,

v.

LOUIS W. SULLIVAN, Secretary of Health and Human Services

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICI CURIAE OF UNITED STATES SENATORS GORDON J. HUMPHREY (R-NH), STEVE SYMMS (R-ID), AND DAN COATS (R-IN) AND UNITED STATES REPRESENTATIVES THOMAS J. BLILEY, JR. (R-VA), CHRISTOPHER H. SMITH (R-NJ), AND ALAN B. MOLLOHAN (D-WV), ET AL. IN SUPPORT OF RESPONDENT

[Additional Amici Continued on Inside Cover]

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
BRAMES, MCCORMICK, BOPP & ABEL
191 Harding Avenue
P.O. Box 410
Terre Haute, Indiana 47808-0410
(812) 238-2421
Counsel for Amici Curiae

September 7, 1990

Graphics LTD., Indianapolis, IN 46202

BEST AVAILABLE COPY

Barbara F. Vucanovich (R–NV)
Henry J. Hyde (R–IL)
Robert K. Dornan (R–CA)
Richard K. Armey (R–TX)
Ron Packard (R–CA)
Duncan Hunter (R–CA)
Edward R. Madigan (R–IL)
W.J. (Billy) Tauzin (D–LA)
Joe Barton (R–TX)
Harold L. Volkmer (D–MO)
Richard H. Stallings (D–ID)
Clyde C. Holloway (R–LA)
J. Dennis Hastert (R–IL)
Robert L. Livingston (R–LA)
H. James Saxton (R–NJ)
Newt Gingrich (R–GA)
Fred Grandy (R–IA)
Norman D. Shumway (R–CA)
Tom DeLay (R–TX)
Douglas Applegate (D–OH)
Howard C. Nielson (R–UT)
Vin Weber (R–MN)
Ileana Ros-Lehtinen (R–FL)
Tommy F. Robinson (R–AR)
Jim McCrery (R–LA)
Don Sundquist (R–TN)
Richard H. Baker (R–LA)
Austin J. Murphy (D–PA)
Bob McEwen (R–OH)
F. James Sensenbrenner, Jr. (R–WI)
John J. Duncan, Jr. (R–TN)
Michael G. Oxley (R–OH)
Virginia Smith (R–NE)
William E. Dannemeyer (R–CA)
James M. Inhofe (R–OK)
Robert C. Smith (R–NH)
Earl Hutto (D–FL)
Bill Emerson (R–MO)
Mel Hancock (R–MO)
Bob Stump (R–AZ)
Robert S. Walker (R–PA)
Dan Burton (R–IN)
Gerald B. Solomon (R–NY)
Arlan Stangeland (R–MN)
Bill Paxon (R–NY)
Philip M. Crane (R–IL)
John J. LaFalce (D–NY)
Clarence Miller (R–OH)
Bill Schuette (R–MI)
Jeremiah Denton (former Senator, R–AL)

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STATEMENT OF THE ISSUE DEALT WITH HEREIN

Do the DHHS regulations which require Title X funded family planning services to be separate from abortion services provided by a grant recipient comply with the intent of Congress in enacting Title X with its provision that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning?"

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INTEREST OF THE AMICI[1]

Because the regulations at issue herein were promulgated under authority of legislation enacted by the Congress of the United States of America, your amici—members of that body—have an interest in ensuring that the Department of Health and Human Services rightly interprets and administers the underlying legislation, Title X of the Public Health Service Act, 42 U.S.C. §300 et seq. (1982 & West Supp. 1990). As members of Congress, your amici also have special insight into the issue of the congressional intent underlying Title X, which is set forth herein. It is this legislative intent to which the Department of Health and Human Services (DHHS) must conform its regulations, which it has done.

INTRODUCTION

When Congress enacted Title X, opposition to abortion was of such strength that Title X could only be enacted with the inclusion of Section 1008. Section 1008 was designed to allay fears that Title X funds would be used to promote abortion in any way. With Section 1008 in place, Title X was enacted with broad bipartisan support.

Over the years, members of Congress have inquired concerning reports that Title X funds were being used to counsel or refer for abortions. They were assured by congressional leaders and by DHHS officials that this was not permitted under Title X. As a result, amendments prohibiting such activity were declared to be unnecessary and defeated. Although such subsequent congressional action speaks nothing to the intent underlying the original enactment of Section 1008, it does highlight the fact that questions about the use of Title X funds for abortion-related activity have been longstanding.

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[1]This brief is filed with permission of all the parties. Letters of permission have been filed with the Clerk of this Court.

Finally, the DHHS has responded to this concern with new regulations. These make clear that Federal funding for preventive family planning activity, which is approved under Title X, must be completely separate from abortion-related activity, the Federal funding of which is barred by Section 1008. The regulations merely guarantee a situation which congressional leaders insisted was in effect when members of Congress sought to add Title X amendments barring abortion counseling and referral, namely, that no such activity is funded under Title X because it is not permitted. These regulations will assure that the intent of Congress in enacting Title X with Section 1008 will be implemented. They will make certain that the public does not perceive that Congress is promoting or encouraging abortion in any way by use of Federal funds.

Your amici include many of the numerous members of Congress who filed comments with the DHHS applauding the new regulations as fulfilling the congressional intent underlying Section 1008. *Unless and until Congress acts to alter Section 1008*, it stands, and the integrity of Title X can best be protected by these regulations.

SUMMARY OF THE ARGUMENT

Crucial to implementing the congressional intent underlying Title X are the requirements of the regulations which prohibit abortion counseling, referral, or advocacy and those which require a physical, publicly-perceivable separation between Title X-funded, preventive family planning and any abortion-related activities in which the grantee may engage. Section I, *infra*, demonstrates how the prohibition on abortion counseling and referral is perfectly consistent with Section 1008 and Title X in general. Section II demonstrates that, in any event, the regulations are based on a permissible construction of the statute. Section III demonstrates that the requirement of the regulation requiring physical separation between Title X-funded, preventive family planning activities and abortion-related activities is essential to fulfilling the Congressional intent in enacting Section 1008 and is entirely reasonable.

ARGUMENT

In determining the congressional intent underlying a statute, this Court first examines the language of the statute itself. *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."). The plain language of the statute compels the conclusion that Congress intended to exclude abortion counseling, referral, or advocacy (except in emergency situations) from Title X programs.

However, even if the enabling statute were considered ambiguous, the agency may still proscribe the funding of such abortion-promoting activity if the agency's construction is a "permissible" one under the statute:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-83 (1984) (footnotes omitted).

In determining what is permissible, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question

initially had arisen in judicial proceedings." *Id.* at 843 n.11. Rather, substantial deference is accorded to the interpretation of the authorizing statute by the agency charged with administering the statute. *Id.* at 844.

I. The Plain Language of Section 1008 Reveals that Congress Did Not Intend Title X Programs to Encompass Abortion Counseling, Referral, or Advocacy.

The statutory provision, Section 1008, which authorizes the DHHS regulations, was adopted by Congress as follows:

> **Prohibition of Abortion**
> **None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning.**

42 U.S.C. §300a-6.

In interpreting the meaning of this provision, this Court looks at "the particular statutory language at issue" in the context of "the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988). As will be seen, Section 1008 standing alone and in context supports the DHHS regulations.

By contrast, the assertion of Petitioners that Section 1008 applies only to the physical performance of abortions is untenable. Brief of Petitioners New York et al. at 12. Petitioners read the provision of Section 1008 as if it actually says, "None of the funds appropriated under this title shall be used in programs which *perform abortions* to control the number and spacing of children for its patients." Of course, that is not how the statute reads. Alternatively, it is urged that "section 1008 prohibits the expenditure of Title funds only for 'abortion,' not 'abortion counseling' or 'abortion referral.' " Brief Amici Curiae of Schroeder et al. at 4, herein. But Section 1008 does not read, as this interpretation would require, "None of the funds appropriated under this title shall be used to perform or fund *abortion* as a method of birth control." Rather, the prohibition applies in

any *program* where abortion is presented as an appropriate method to control the number and spacing of one's children. This encompasses abortion counseling and referral. There is no need for these terms to be expressly used because of the way the prohibition is formulated, and their absence is irrelevant and meaningless.

The Petitioners rely greatly on the notion that the term "method" denotes a procedure. *Id.* Clearly the notion of "methods" employed in a Title X program for family planning is broader than those in which the physical performance of a procedure occurs. This is made clear by a careful examination of the terminology of Section 1008 both alone and in context with other passages.

Standing alone, Section 1008 supports the DHHS regulations. In common usage, a "method" is "a procedure or process for attaining an object" or "a way, technique, or process of or for doing something." *Webster's Ninth New Collegiate Dictionary* (1985). "Family planning" means "planning intended to determine the number and spacing of one's children through effective methods of birth control." *Id.* When one plans to determine the number and spacing of one's children, he or she selects an effective procedure or process for controlling birth. A Title X program is intended to give information on the various effective methods for controlling the number and spacing of one's children. With some methods, the program may perform an action other than mere communication. For example, employees of the program may insert an IUD. However, in providing other methods, such as barrier or hormonal methods, a mere provision of needed items or writing a prescription may suffice. In providing these methods, the Title X program performs no "procedure" on the patient. And in providing the method of natural (rhythm) birth control (required by Title X to be provided, 42 U.S.C. §300(a)) the Title X program need not provide even supplies or a prescription. Only communication of information is provided.

Thus, it is disingenuous for Petitioners to insist that when a

Title X program provides someone with a "method" of birth control it must perform a procedure upon them. Providing information about abortion, by counseling or referring for abortion, is every bit as much the provision of a "method of birth control" as providing information about a rhythm method of birth control. The key is whether the procedure or method is presented by the Title X program as an appropriate method of controlling the number and spacing of one's children.

Therefore, while Title X may approve and fund the provision of a number of methods of birth control, by the provision of either information or some procedure, Section 1008 prohibits Title X grantees from providing, by either information or actual procedure, one method of controlling the number and spacing of one's children — abortion.

Placed in the larger context of Title X, Section 1008 even more starkly prohibits counseling or referring for abortion (except in emergency situations). This is seen clearly in the distinction between "methods" and "services." Petitioners urge that this distinction permits "services," which they interpret to include abortion counseling and referral, but not "methods," i.e., the actual provision of abortion. Brief of Petitioners New York et al. at 12. However, "services" merely means the works performed by one who serves. *Webster's Ninth New Collegiate Dictionary*. One who provides another with methods of birth control is providing services to that person. If a Title X grantee is prohibited from presenting abortion as an acceptable method of birth control, then the grantee is also prohibited from providing any services relating to abortion. Therefore, the distinction is useless in attacking the regulations.

Moreover, when Congress intends to communicate solely the performance of abortion, it speaks expressly, e.g., "the *performance of* any sterilization procedure or abortion." 42 U.S.C §300a-7(b)-(d) (repeated use of these terms) (emphasis added). By selecting the terminology it chose, Congress clearly intended to bar any Title X funds to any entity which would

present abortion as a means to plan the number and spacing of one's children. That intent encompasses an intent to bar counseling and referring for abortion, not just the performance of abortion. Although Congress could have expressly barred "counseling and referring for abortion" in Section 1008, the wisdom of doing so expressly has only been recognized more recently. *See, e.g.* Adolescent Family Life Act, 42 U.S.C.A. §300z-10 (West 1982). However, in the legislation referred to earlier in this paragraph, passed nearer in time to Section 1008, Congress clearly knew how to refer expressly to the actual performance of abortion when it desired to do so. *See* 42 U.S.C. §300a-7 (enacted in 1973, after *Roe v. Wade* had decriminalized abortion).

The "natural construction" of Section 1008 was captured by the Second Circuit in a manner which may scarcely be made more concise or precise:

> Appellants contend that the statute proscribes only the providing for, or the funding of, the performance of abortions and that the Secretary may not prohibit abortion counseling. This is a highly strained construction of Section 1008. A principal function of grantees under Title X is to provide information or 'counseling' as to a range of methods of family planning. A program that counsels use of a particular contraceptive device plainly treats that device as a 'method of family planning.' In this context, it would be wholly anomalous to read Section 1008 to mean that a program that merely counsels but does not perform abortions does not include abortion as a 'method of family planning.' Moreover, when Congress has sought to prohibit the use of federal funds to perform actual abortions, it has used language specifically tailored to that end. *See, e.g.*, Pub. L. No. 100-202, 101 Stat. 1329-99 (1987) ('Hyde Amendment' to appropriations act stating: 'None of the Federal funds provided in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term . . . .'). In the present context, the natural construction of Section 1008 is that the term 'method of family planning' includes counseling concerning abortion.

State of New York v. Sullivan, 889 F.2d 401, 407 (2d Cir 1989).

II. Even if Section 1008 Were Ambiguous, the DHHS Regulations Are Based on a Reasonable Construction of the Statute And There Is No "Clearly Expressed Legislative Intent to the Contrary."

If, as demonstrated in the prior section, Section 1008 may so readily and logically be interpreted to support the new regulations at issue herein, only a very strained reading of the language of Title X could find that Congress intended by this language to expressly *require* the contrary position, i.e, that Congress intended to fund abortion counseling and referral. The most one could reasonably argue is that the language of Section 1008 is ambiguous.[2]

If Section 1008 is ambiguous as to whether it does or does not permit abortion counseling or referral, then a gap exists which the DHHS may fill, as explained by this Court in *Chevron*, 467 U.S. at 843-44 (emphasis added):

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary and capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is *implicit* rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a *reasonable* interpretation made by the administrator of an agency.

[2]*See Massachusetts v. Sullivan*, 873 F.2d 1528, 1533 (1st Cir. 1989) ("We find the statutory language inconclusive. The prohibition in section 1008 is phrased broadly and is susceptible of many differing interpretations. . . . We must therefore look beyond the exact wording of section 1008 to assess the meaning of the statute. . . . We find the legislative history inconclusive.") (striking down the new Title X regulations on non-statutory grounds).

Where the legislation delegation is implicit, as in the cases at bar, an interpretation of the agency must be upheld unless it is not reasonable, i.e., it is "arbitrary and capricious," or it is "manifestly contrary to the statute." *Id.* The DHHS regulations are a reasonable interpretation of the statute, as demonstrated above, and are not contrary to Title X and Section 1008. The only remaining way in which these regulations may be attacked is if there exists 'a clearly expressed legislative intention to the contrary.' *Consumer Product Safety Commission*, 447 U.S. at 108.

As demonstrated *infra* no such legislative intention exists. Rather, the legislative history of Section 1008 supports the new regulations. Therefore, the new regulations must be considered within permissible constructions of Section 1008.

A. Whether the Secretary's Interpretation of Section 1008 Is Entitled to Any Degree of Deference Makes No Difference.

Petitioners and amici urge that this Court should give little or no deference to the DHHS interpretation of Title X. Brief of Petitioners Rust et al. at 37-38; Brief Amici Curiae of Schroeder et al. at 7-9, herein. Indeed, the amici urge that "no deference at all" may be proper. Brief Amici Curiae of Schroeder et al. at 9 n.10, herein.[3] However, even if some degree of deference were not appropriate, although deference

[3]This is so, it is argued, because "'the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.'" *Id.* (quoting *Chevron*, 467 U.S. at 843 n.9). It is, of course, true that this Court is the final authority in interpreting a statute. However, as this Court said in *Chevron*, 467 U.S. at 845,

> Once [a court] determine[s], after its own examination of the legislation, that Congress did not actually have an intent regarding [an aspect dealt with in the regulations], the question before it is not whether in its view the concept is 'inappropriate' in the general design of a program . . . , but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one.

(footnote continued)

doubtless is proper, this simply means that this Court will more carefully examine the statute for itself to determine whether it permits the regulations promulgated. As demonstrated herein, the statute requires, or at a minimum permits, such regulations, as this Court will find upon close examination. Therefore, this case hinges in no way on the degree of deference to be afforded an agency of the United States.

B. The Secretary's Regulations Are Based Upon a Permissible Construction of Section 1008.

This Court should approve the DHHS regulations because they are reasonable and because there is no clearly expressed congressional intent to the contrary.

1. The DHHS's Interpretation of Section 1008 Furthers the Congressional Intent in Enacting That Provision and Does Not Thwart the Overriding Purpose of Title X.

The Secretary rightly asserts that his pole star must be the intent of Congress in enacting Title X with its prohibitions in Section 1008. To assert, as do Petitioners and some amici, that the DHHS regulations thwart the overriding purpose of Title X, is to say that following the congressional intent (in enacting Section 1008) violates congressional intent (in enacting Title X with its Section 1008 exception). This is nonsensical.

While it is true that Congress intended Title X "to assist in making comprehensive voluntary planning services readily available," Pub. L. No. 91-572, §2(1), 84 Stat. 1504 (1970), it

Footnote 3 continued

Chevron speaks at length about the deference due an Administrator, so that if his " 'choice is a reasonable accommodation of conflicting policies that were committed to the agency's care' " it should be upheld " 'unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.' " *Id.* (quoting *United States v. Shimer*, 367 U.S. 374, 382-83 (1961)).

enacted this "comprehensive" bill with an exception—Section 1008—making it somewhat less comprehensive. The key issue, then, is to what extent Section 1008 limited the "comprehensive" nature of Title X. It is unreasonable to continue asserting the comprehensiveness of a statute against a limitation designed to restrict that comprehensiveness. Such an approach would eliminate all exceptions.

Moreover, general remarks—such as those concerning the intended comprehensive nature of a program—are not probative of congressional intent on a narrow issue. *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America*, 325 U.S. 161, 161-69 (1945). People commonly speak in shorthand expressions in situations where the hearer may be expected to be aware of the commonly-understood, implicit, underlying limitations on what is said. Therefore, the fact that congressional reports and floor speakers speak of Title X as a comprehensive program without always qualifying the statement with the strictures of Section 1008 does not speak to the issue of the scope of Title X.[4] As the Second Circuit succinctly put the matter:

> Whatever force such generalized statements might have in the absence of Section 1008, they do not specifically mention counseling concerning abortion as an intended service of Title X projects, and they surely cannot be read to trump a section of the statute that specifically excludes it.

[4]In the same manner, the statement by the Conference Committee which described Section 1008 as prohibiting "the use of [Title X] funds *for abortion*," H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. 8 (1970), J.A. at 70a (emphasis added), is a shorthand expression for abortion-related activity. This is made clear by the statement of Rep. Dingell, discussed *infra*, which made clear that "abortion is not to be encouraged or promoted in any way through this legislation." 116 Cong. Rec. 37,375 (1970).

State of New York v. Sullivan, 889 F.2d at 408.

When Congress enacted Title X in 1970, abortion was illegal in most states except under the gravest circumstances.[5] Many states, such as Texas, made exceptions to their abortion prohibition only where the life of the mother was at risk. *Roe v. Wade*, 410 U.S. 113 (1973) (discussing and striking down the Texas statute). Some states had adopted the American Law Institute model statute which allowed for abortion in other grave circumstances, but provided various safeguards, such as the requirement that a review panel approve the performance of an abortion. *Doe v. Bolton*, 410 U.S. 179 (1973) (discussing and striking down the Georgia ALI statute). Opposition to abortion was widespread in 1970 and legislation in most states limited it to a great extent, as evidenced by the fact that when *Roe v. Wade* was decided it swept away the abortion laws of virtually every state.

[5]Rep. Dingell, in House debate, gave a lengthy, eloquent exposition of the evils of abortion, 116 Cong. Rec. 37,375-79, in which he set out the legal, medical, and scientific reasons why abortion was to be condemned and why "the committee members clearly intend[ed] that abortion [wa]s not to encouraged or promoted in any way through [Title X]." *Id.* at 37,375. He noted that abortion was generally illegal in most states and that states experimenting with liberal abortion laws were considering enacting more restrictions on abortion, *id.* at 37,376 n.25. He asserted further, that

> There is a fundamental difference between the prevention of conception and the destruction of developing human life. . . .
>
> If there is any direct relationship between family planning and abortion, it would be this, that properly operated family planning programs should reduce the incidence of abortion. . . .
>
> Furthermore, there is evidence that the prevalence of abortion as a substitute or a *back-up* for contraceptive methods can reduce the effectiveness of family planning programs.

Id. (emphasis added). This final assertion completely deflates any notion that abortion counseling and referral are necessary in Title X programs to provide abortion as a back-up for contraceptive failure. *See, e.g.*, Brief of Petitioner Rust at 44.

Likewise, such opposition existed to abortion in Congress that Title X could not be enacted without Section 1008.[6] Under most state laws, counseling and referring clients for the vast majority of abortions would have been abetment to criminal activity. Congress took special care to avoid this result or the result of preemption of state abortion laws by enacting Section 1008.[7] No evidence exists from this action to support the notion that Congress intended to require or permit abortion counseling, referral, or advocacy in Title X-funded programs.

At the hearings on S. 2108, which became Title X, abortion was mentioned in one way which is significant for determining

[6]In 1970, the term "family planning" did not encompass abortion, which was largely illegal in most places. This is evident from the introductory language of S. 2108, which stated that "family planning has been recognized nationally and internationally as a universal human right." *Family Planning Services: Hearing on S. 2108 [and related bills] Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 39 (1970). While such a statement might be made of contraception after *Griswold v. Connecticut*, 381 U.S. 479 (1965), it could not reasonably be made of abortion prior to *Roe v. Wade*, 410 U.S. 113.

[7]The concern over federal preemption was stated at the time by Congressman Dingell as follows:

> The criminal codes of most states sanction abortion only in certain strict and clearly-circumscribed cases. Even the broadest interpretation of these laws would not lead one to the conclusion that they in any way allow for such a procedure as an accepted method of family planning. For the Congress of the United States to appropriate funds for a procedure which would violate the criminal law of a vast majority of American jurisdictions would be to raise constitutional questions of a most serious nature.

116 Cong. Rec. 37379 (remarks of Rep. Dingell). This concern with federal preemption is far from past. As this Court returns to the states more legislative control over abortion, a process evident in the most recent abortion cases, *see* Brief Amici Curiae of the National Right to Life Committee, Inc. in Support of Respondent, herein, abortion on demand will no longer be the law of the land. Concerns over preemption or funding the abetment of criminal activity will once again come to the fore, just as they concerned Congress prior to *Roe v. Wade*.

congressional intent.[8] A number of persons made strong arguments that adoption of Title X would have the effect of reducing the incidence of abortions. Most notable of these witnesses was Dr. Alan Guttmacher, representing Planned Parenthood, who repeatedly argued that adoption of the Act would reduce both legal and illegal abortions. *Family Planning and Population Research 1970: Hearings on S. 2108 Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st & 2nd Sess. 65, 68, 78 (1970) (statement of Dr. Alan Guttmacher of Planned Parenthood); *cf. id.* at 99 (statement of Mr. Carl Flemister, representing Citizens Committee for Children as well as Planned Parenthood of New York City). From the prevalent and forceful assertion of this argument, it is evident that the supporters and advocates of Title X saw it as the legislation that would best reduce abortions by substituting preventive methods of family planning.

The argument that the incidence of abortion would be reduced by continued funding of Title X has been asserted repeatedly in legislative deliberations leading to the passage of Title X. This argument, influential in the minds of those voting for Title X, is inconsistent with any intent to allow abortion counseling and referral, which would have the effect of increasing, not decreasing, the incidence of abortion.

Congress also intended to keep pregnancy prevention strictly separated from pregnancy termination in Title X programs. As already discussed, one of the major arguments

[8]While statements of individuals testifying at hearings are not as weighty in establishing legislative intent as, for example, the statements of a bill's prime sponsor or a committee report, where a clear pattern of emphasis is evident, such statements should be given some weight. "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." *United States v. Fisher*, 2 Cranch 358, 386 (1805). Such a clear pattern of emphasis is set forth in the text, namely, that Title X was presented to Congress as a vehicle for diminishing the number of abortions by promoting preventive birth control measures which would prevent conception.

employed in the campaign for passage of Title X was that it would reduce the incidence of abortion. Thus, the two were seen as separate and distinct. The 1970 report of the conference committee on Title X declared:

> It is, and has been, the intent of both Houses that funds authorized under this legislation be used only to support *preventive* family planning services, population research, infertility services and other *related* medical, informational, and educational activities.

H.R. Conf. Rep. No. 1667, 91st Cong., 2nd Sess. 8-9 (1970) (emphasis added).

As abortion is not a "preventive" family planning measure, it was not to be included within the scope of Title X. Moreover, the other services to be offered were to be "related" to "preventive family planning services, population research, [and] infertility services." By the usual canons of grammar and statutory construction, the term "related" is governed by the term "preventive," which modifies the subsequent terms in the sentence. Thus, abortion counseling and referral for abortion are not permissible under the provision of Title X as "related medical, informational, and educational activities" because they do not relate to preventive family planning.

That the promotion of abortion and the promotion of preventive family planning were to be kept strictly separated in the Title X program is also evident in the House committee hearings on Title X. The members of the committee were adamant in their insistence that Title X had nothing to do with abortion.[9] Subcommittee member, Congressman Preyer stated the matter thus:

[9]*See, e.g., Family Planning Services: Hearing on S. 2108 [and related bills] Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce*, 91st Cong. 2d Sess. 245-46 (1970) (testimony of Mrs. David R. Mogilka and responses by Rep. Carter):

REP. CARTER: Now to relieve your mind further about abortions and

(footnote continued)

> [Y]ou mentioned the idea of abortion . . . and I certainly agree with you . . . and am against easy abortion and would only accept it in a very extreme and rare case. But is there anything in this bill that says anything about abortion?

Family Planning Services: Hearings on S. 2108 [and related bills] Before the Subcomm. on Public Health and Welfare of the House Committee on Interstate and Foreign Commerce, 91st Cong., 2nd Sess. 321-22 (1970) (response of Congressman Preyer to testimony of Msgr. Alphonse S. Popek).

In the same exchange, Congressman Preyer expressly addressed abortion counseling. Responding to the concern of a witness that a social worker counseling on contraception might easily slip into counseling on abortion, Representative Rich-

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Footnote 9 continued

> so on, we certainly don't mean for this bill to cover those widespread things. . . .
>
> Personally, I am opposed to abortions except in such cases as might endanger the life of the mother or in case of incest or rape, and personally I would not support any bill that does advocate all these things which you have mentioned.
>
> . . . .
>
> MRS. MOGILKA: Would you feel that if the Planned Parenthood Association is one of the private organizations given grants and funding under this bill, they should implement their program of abortion. . . . Or would you feel you would then bar them from proceeding with abortion. . . .
>
> REP. CARTER: . . . I don't believe this bill covers abortions at all.

Also noteworthy in this colloquy is the interwoven theme of voluntariness. That a subcommittee member could represent that Title X had nothing to do with abortion and yet retains its voluntary nature, *id.*, disproves any assertion that the voluntariness requirement of Title X requires abortion counseling. *See, e.g.*, Brief Amici Curiae of Schroeder et al. at 13, herein. The emphasis on voluntariness, in the context of the legislative history, is that no one shall be forced to have an abortion, be sterilized, or use contraception.

The same may be said of the emphasis on allowing people to do what their conscience dictates. *Id.*; 116 Cong. Rec. 37,382 (1970) (statement of Rep. Rogers). This in no way implies an approval of abortion counseling or referral, for the legislative history reveals that the issues of sterilization and contraception were also matters of conscience for many and were the true focus of the debate relating to conscience.

ardson Preyer declared that such abortion counseling would be an "abuse" of the law. *Id.* at 321.[10]

Representative Dingell, the author of section 1008, before the full House, which was considering Title X, declared that the intent was more than a mere ban on the performance of abortions. He stated: "With the 'prohibition of abortion' amendment—Title X, section 1008—the committee members clearly intend that abortion is *not to be encouraged or promoted in any way* through this legislation." 116 Cong. Rec. 37375 (emphasis added).[11] Thus, the intent was much broader than a mere bar to the performance of abortions. Clearly, abortion counseling and referral for abortion constitute encouragement or promotion of abortion, which is prohibited by the congressional intent in enacting section 1008.

In fact, the legislative history of Section 1008 clearly supports the notion that abortion counseling and referral are proscribed in Title X programs. This is evident from the Senate Report which indicated that a "successful family planning pro-

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[10]Certain amici omit this response, declaring that "Subcommittee testimony by Monsignor Alphonse S. Popek, inveighing against abortion and abortion counseling, does not shed any light on the meaning of Section 1008." Brief Amici Curiae of Schroeder et al. at 12 n.13. herein.

[11]That Rep. Dingell now wishes to restate his statement, Comments of Chairman John D. Dingell, Committee on Energy & Commerce, on Proposed Rules 42 CFR Part 59—Fed. Reg. Notice, Sept. 1, 1987 (Oct. 14, 1987) at 2, in no way affects the force of his original statement in interpreting the legislative intent underlying Section 1008. It is the nature of the legislative process that legislators are affected in voting by what they hear prior to the vote and not by what a speaker says twenty years later that he intended to say. Moreover, because Rep. Dingell's apparent change in attitude was affected by the decriminalizing action of *Roe v. Wade* on state abortion laws, any reliance on his current statements must be tempered by the actions of this Court in altering the reach of *Roe v. Wade*.

Because of this fact, reliance on the current legality of abortion on demand is somewhat temporary. Thus, when amici urge that "[t]here is no support for reading into [Rep. Dingell's] statement an otherwise unstated intent to preclude referral to other health care providers that *could legally perform abortions in their state*," they state a transitory situation. Brief Amici Curiae of Schroeder et. al. at 12, herein (emphasis added).

gram" should provide "consultation" and "referral to other medical services as needed." S. Rep. No. 1004, 91st Cong., 2d Sess. 10 (1970). It was in the context of such a program, that we must read Section 1008. Because Title X was to be a program featuring consultation and referral, and not just performing (or funding) various procedures, the bar on funding programs presenting abortion as a means of controlling the number and spacing of one's children must logically extend to such consultation and referrals.

2. It Is Sufficient That DHHS's Regulations Are Consistent with the Legislative Intent Underlying Section 1008; They Need Not Totally Comport With Prior Regulations.

The fact that the new DHHS regulations differ in some respects from those preceding them is evident, otherwise this case would not exist. However, this does not affect the validity of the regulations at issue. *Cf.* Brief Amici Curiae of Schroeder et al. at 13, herein.

The fact that there were prior, different regulations does not preclude an agency from changing policies "after reasoned consideration of relevant factors." *Western Union Int., Inc. v. FCC*, 804 F.2d 1280, 1291 (D.C. Cir. 1986); *cf. Motor Vehicle Mfrs. Ass'n v. State Farm Mutual*, 463 U.S. 29, 59 (1983) (Rehnquist, J., dissenting) (a change in administration is a reasonable basis for reevaluation of prior agency policy). What the DHHS must comply with is the intent of Congress, not the policy choices of a predecessor administration.

3. The Congressional Intent Expressed in Subsequent Legislative History Regarding Title X, Although Less Controlling, Continues to Exclude Abortion Counseling and Referral for Abortion Within Title X Programs.

Critics of the new Title X rules have relied upon certain recent developments as indicating a changed legislative intent.

This reliance is misplaced in two ways. First, subsequent legislative history is of limited value in determining the legislative intent of passages, such as Section 1008, which remain unchanged by Congress and have clear prior legislative histories. Second, the recent events do not indicate what these critics claim they do. The failure of a legislature to act is not a sure indicator of approval of a policy in place, and this Court has expressed reluctance to draw such an inference.[12]

a. Congress Has Been Largely Unaware of the Department's Interpretation of the Statute.

Caution in reading congressional approval of the former Title X rules, promulgated in 1981, or of earlier advisory opinions by the DHHS Office of General Counsel (OGC) as congressional acquiescence on the matter is especially important in the present case. As noted in the Preamble to the new Title X regulations, even such a prominent leader in the 1978 Title X debates as Congressman Harold Rogers seemed unaware of the OGC advisory opinions, which allowed activity not having the principal purpose or effect of promoting abortion. 53 Fed. Reg. 2923 (1988). Such lack of awareness of what the DHHS had allowed must have been widespread if Congressman Rogers was unaware of the interpretation given to section 1008 by the OGC.

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[12] *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual*, 463 U.S. 29 (1983). Even statements made during oversight hearings are accorded little weight in interpreting previously enacted legislation. *Regional Railroad Association Act Cases*, 419 U.S. 102, 132 (1974); *see Tennessee Valley Authority v. Hill*, 437 U.S. 153, 193 and 209 (1978) (Powell, J., dissenting). And where Congress has published a committee report, after enactment of legislation, which interprets that legislation, the Supreme Court has refused to give it much weight. *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 118 n.13 (1980) ("subsequent legislative history will rarely override a reasonable interpretation of statute that can be gleaned from its language and legislative history prior to its enactment"). In the limited circumstances where the Court has relied on post-enactment expressions, the Court has done so cautiously and selectively. *See, e.g., Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980).

Representative Rogers' statements are especially significant, because he presided over the oversight subcommittee and its hearings on Title X, from its inception in 1969 until the end of the 95th Congress in 1978, when he retired. He categorically rejected the notion that Title X funds could be used for abortion counseling and referral. In 1975, he wrote a letter, which was made a part of his subcommittee's record, declaring that Title X's strictures would "prohibit the support of any program in which abortion counseling or abortion referral services are offered." *Comments of the Honorable Paul G. Rogers on the Statement of the United States Coalition for Life: Hearings on H.R. 2954 and 2955 Before the Subcomm. on Public Health and Environment of the House Committee on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. 260 (1975); 124 Cong. Rec. 37046 (1978) (quotation of the passage by Rep. Dornan).

In 1978, Title X was again due to be extended. However, a number of pro-life legislators were concerned with recent allegations that Title X funds were being used in programs employing abortion counseling and referral. In House floor debate, Congressman Robert Dornan offered a series of amendments to curb the perceived abuses of Title X. 124 Cong. Rec. 37045-47. One would have "enabled groups which specialize in alternatives to abortion to receive Title X funding." *Id.* at 37045. They would have been allowed to do so without being required to "counsel abortion," as required by "[the Department of Health Education and Welfare (HEW)] . . . as an eligibility precondition to title X grants or contracts." *Id.* The response of Chairman Rogers, floor manager of the Title X reauthorization that year, was that pregnancy counseling of any kind was forbidden under Title X, even counseling of pregnant women which was designed to discourage abortion. *Id.* He declared that allowing the counseling of pregnant women "would simply change the whole concept of family planning." *Id.* He insisted that "[f]amily planning occurs before pregnancy." *Id.* He saw nothing wrong with setting up a program of counseling for pregnant women, but opposed the amendment, because "the need is too great for family planning

before pregnancy." *Id.* That, he insisted, was what Title X was about "to prevent the need for abortion." *Id.*

Dornan offered another amendment barring any "entity which directly or indirectly provides abortion, abortion counseling, or an abortion referral services [sic]." *Id.* He observed that this amendment would "reinforce the assurances . . . already given us, namely, that none of the money under . . . title X . . . will be used . . . for abortion, abortion counseling, or abortion referral in any way whatever." *Id.* at 37046. He cited a letter from HEW, Office of the General Counsel, dated 1974, which declared it the policy of HEW that Title X funds "may not be expended to perform, encourage, or promote abortions." *Id.* However, he observed that recent reports indicated that 117 Title X recipients were counseling and referring for abortion with federal funds. *Id.* He noted that such activity was forbidden under the Dingell amendment, section 1008, and an earlier statement by Congressman Rogers, that counseling and referral for abortion were forbidden under Title X. *Id.*

Congressman Rogers opposed the amendment, because it was an "unneeded amendment." *Id.* It was unneeded because, as he declared:

> Abortion is not a method of family planning. Abortion comes after pregnancy—after pregnancy. And the gentleman misses the point of what we are doing in Title X. It is before—before. It is to let people know how to avoid pregnancy. *Id.*

He reiterated his point that "[t]he amendment is not needed." Congressman Dornan rejoined, "What about the 117 organizations at a minimum that are abusing these funds?" *Id.* Congressman Rogers declared that it was "simply not done. It is not permitted under the law." *Id.*

The legislative history reveals strong argument by the chairman of the oversight subcommittee against the Dornan amendment, barring abortion counseling and referral, as "not needed," both because existing law proscribed such activity,

and because, in Congressman Rogers' belief, the alleged abuses were not occurring. It also reveals no knowledge of any interpretation on the part of HEW which would allow abortion counseling and referral, but rather indicated a belief that HEW proscribed abortion counseling and referral. The legislative history also reveals an understanding that counseling of any kind for pregnant women was beyond the scope of Title X. These were the arguments before the House when it voted down the Dornan amendments. No arguments that abortion counseling or referral for abortion should be included in Title X programs appear in the record. Thus, this legislative history reveals the common belief in Congress that abortion counseling and referral were not within the purview of Title X.

The evidence that Congress—and often even DHHS administrators—were unaware of the prior policy of permitting abortion counseling and referral is powerful.

In 1984, DHHS Secretary Heckler declared her belief that Title X prohibited "abortion advice, counseling, or involvement." *Health and the Environment Miscellaneous—Part 3: Hearings on Reauthorization of Title X Before the Subcomm. on Health and Environment of the House Comm. on Energy and Commerce*, 98th Cong., 2d Sess. 465 (1984) (statement of Margaret Heckler, Secretary, DHHS). She also stated that Title X clinics were complying with Title X's prohibitions against abortion.

Also in 1984, DHHS Assistant Secretary for Health Brandt and Deputy Assistant Secretary for Population Affairs Mecklenberg were totally unaware that DHHS had a policy allowing abortion counseling and referral, as indicated in the following colloquy before a Senate subcommittee:

> SEN. DENTON: . . . Dr. Brandt, I am going to read the list of activities related to abortions, and ask you to tell me whether or not each one of them is allowable under the title X program. . . . .
>
> First, for the activity to provide information about abortion services.
>
> MRS. MECKLENBURG: No.

Reauthorization of Family Planning Programs, Title X of the Public Health Serv. Act, 1984: Hearing Before the Subcomm. on Family and Human Services of the Senate Comm. on Labor and Human Resources, 98th Cong., 2d Sess. 53 (1984).

Senator Denton later returned to this issue:

> SENATOR DENTON: The first question we asked, which Mrs. Mecklenburg answered, I maintain was answered incorrectly. The question was, Can the activity provide information about abortion services, and she said, "No," and to my knowledge, the answer to that question is "Yes."
>
> DR. BRANDT: Well, they cannot do it in the conduct of the family planning clinic services that they are providing with Federal funds.

Id.

In 1989, Dr. Mason, DHHS Assistant Secretary for Health was questioned concerning comments made in 1984 by Secretary Heckler that "the Inspector General of HHS had determined that 'the prohibition against abortion was well-known at the level of the family planning clinics, and it was being honored.'" He was asked if he still agreed with that assessment. He responded that he did. *Federal Family Planning Program Reauthorization: Hearing on H.R. 930 Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 28 (1989). Shortly thereafter, however, he was asked by Congressman Bliley whether, "in her 1984 testimony, . . . Secretary Heckler realize[d] that title X projects were being required to counsel and refer on abortions?" *Id.* at 31. Dr. Mason referred the question to Nabers Cabaniss, Deputy Assistant Secretary for Population Affairs, for a response, because he had not been at DHHS in 1984. Ms. Cabaniss replied, "I believe that Mrs. Heckler stated when she came before the subcommittee at that

time that abortion counseling was prohibited in title X. So she was not aware that HHS had guidelines in effect which required abortion counseling." *Id.*

If key congressional leaders, such as Rep. Rogers, and officials of DHHS, such as Secretary Heckler, were unaware that DHHS had a former policy of allowing abortion counseling and referral, it is doubtful that Congress in general knew and acquiesced in such a policy.

The present political reality is that, since the Public Health Service guidelines mandating abortion referral became highly visible, neither the chairman of the oversight subcommittee in the House nor the chairman of the oversight committee in the Senate has been able to move a reauthorization bill for Title X through Congress. Sponsors have been unwilling to open their bills to strengthening amendments on the abortion issue and unable to obtain the necessary two-thirds vote, under suspension of the rules, to win passage without opening the bills to amendments. In fact, in 1985, such a reauthorization attempt was made and voted down, winning a majority but failing to achieve the needed two-thirds vote. 131 Cong. Rec. H4364-5 (daily ed. June 18, 1985).

Thus, to argue that congressional inaction on Title X indicates approval of prior guidelines or interpretations is erroneous. Any subsequent expressions by members or committees of Congress should not be weighed too heavily in determining the congressional intent behind provisions that remain in effect, unchanged from their original form of enactment, with a clear legislative history.

b. Congress Has Never Reenacted Title X and Congressional Reauthorization of Title X and Continuing Resolutions Do Not Indicate Congressional Acquiescence.

Because Congress has neither reenacted Title X nor amended Section 1008, the only formal legislative action by

Congress was the original enactment of these provisions. Reauthorization of the spending resolution does not amend, repeal, or otherwise affect previously enacted substantive law. *Cf. TVA v. Hill*, 437 U.S. 153, 190-93 (1978). Therefore, these later actions do not affect the intent underlying Section 1008. However, certain actions are instructive of the ongoing congressional attitude.

Funding for Title X was due to expire on June 30, 1973, six months after *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), made abortion legal. The issue of funding abortions, or abortion counseling or referral, did not come up during the reauthorization deliberations, indicating that Congress felt it unnecessary to amend section 1008 in light of *Roe*. A central argument continued to be that Title X was preventive in nature and would decrease abortions.[13] As noted above, this is difficult to square with government-funded abortion counseling and referral. As noted in the preceding subsection, Congress was unaware of the existence of abortion counseling and referral policies in Title X programs and so could not acquiesce in any such DHHS policy.

c. The Failure of Congress to Enact Legislation More Expressly Imposing the Restrictions of the DHHS Regulations Is Due to Ignorance of DHHS Practices and Political Deadlock.

The fact that Congress failed to enact amendments which

[13] *Health Programs Extension Act of 1973: Hearings on H.R. 5608 and S. 1136 Before the Subcomm. on Public Health and Environment of the House Committee on Interstate and Foreign Commerce*, 93rd Cong., 1st Sess. 119 (1973) (testimony of Mr. Russell Richardson, Director of the Georgia Governor's Council on Family Planning) and 174 (testimony of Mr. Frederick Jaffe, Vice President of Planned Parenthood Federation of America); *Family Planning Services and Population Research Amendments of 1973: Hearings on S. 1708 Before the Special Subcomm. on Human Resources of the Senate Committee on Labor and Public Welfare*, 93rd Cong., 1st Sess. 142 (1973) (testimony of Dr. Thomas L. Hall of the American Public Health Association) and 172 (testimony of Dr. Louise B. Tyrer of the American College of Obstetricians and Gynecologists).

would have legislatively expressly prohibited abortion counseling and referral says nothing to the congressional intent underlying Section 1008. *Cf.* Brief Amici Curiae of Schroeder et al. at 19, herein. As noted above, subsequent legislative history is particularly suspect where no amendment to the original enactment results. Moreover, as noted at length above, the reason these amendments did not pass was because they were believed unnecessary. *See supra*, II(B)(3)(a).

It has been contended that the 1987 statement of certain current members of the House oversight subcommittee, such as Congressman Henry Waxman, and of certain members of the Senate indicates the controlling congressional intent. In response to a threatened cutoff of funds for Planned Parenthood, these members of Congress declared that Congress had "reexamined the program several times since [1970] and reauthorized it without significant change." 133 Cong. Rec. E779 (daily ed. March 5, 1987). The views of these members of Congress were substantially incorporated in a provision of Sen. Lowell Weicker, inserted in committee in H.R. 3058, which was the 1988 appropriations bill for the DHSS. 133 Cong. Rec. S14253 (daily ed. Oct. 14, 1987); *see*, S. Rept. No. 189, 100th Cong., 1st Sess. 193 (1987). It provided that funds for Title X could only be expended under the regulations and guidelines then in effect, precluding funding under the proposed rules, which have become the new rules at issue in this case.

This event is of special importance in determining the current attitude of Congress. The proposed rules, now at issue in this case, were published while Congress was in session. Congress had the benefit of being advised of them, through the promotional efforts of Congressman Waxman, Senator Weicker, and their colleagues in the effort to reject the new rules. If Congress believed that the new rules promulgated by the DHHS were outside the scope of its intent for Title X, it had the perfect vehicle before it, in the form of the Weicker amendment, to reject the proposed regulations. However, it did not do so. Rather, Congress rejected the Weicker amendment, by

adopting the conference committee report, which deleted the provision. H.R. Conf. Rep. No. 498, 100th Cong., 2nd Sess. 943 (1988) (H.R.J.Res. 395).

Thus, the Weicker amendment represented the views of only certain members of Congress, and not the intent of Congress. The statements of members of Congress, which are rejected by the Congress as a whole, are of no value in determining the intent of Congress.

III. The DHHS Requirement of Physical Separation of Title X-Funded Programs from Programs Offering Abortion-Related Services Is In Keeping With Congressional Intent and Responsive to an Existing Problem.

As fully developed above, Congress intended by Section 1008 to completely separate Title X-funded, preventive family planning programs from programs of grantees which engage in abortion-related activity. Both Section 1008 and the Conference Report on Title X indicate that there must be separation between *programs* conducted by a grantee, not just separate bookkeeping entries. H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. 8-9 (1970). While the Conference Report indicates that Title X is not intended to interfere with or limit [non-Title X] *programs* conducted by Title X grantees, this statement cannot properly be stretched to allow commingling of Title X services with abortion-related activity which is specifically proscribed by Section 1008. To do otherwise would allow the tail to wag the dog, i.e., local grantees rather than Congress would control the way federal money is expended. No generalized language about integration of program with existing programs can stretch Title X beyond the limit on this integration imposed by Section 1008.

Moreover, one of the problems specifically identified by the GAO report of 1982 was that members of the public could (and some did) believe that the Federal government was providing abortion services. General Accounting Office, *Restrictions on*

Abortion and Lobbying Activities in Family Planning Program Need Clarification (1982). This provides a solid justification for the requirement of physical separation sufficient to inform the public that the Federal government is not funding abortion services.

Two important considerations need to be emphasized regarding the separation requirement. First, there is a grant appeals procedure which safeguards grantees against easy termination. 42 CFR 50.404(a); 42 CFR 50.406.

Second, the limited nature of the impact on Title X grantees is expressed by DHHS Deputy Assistant Secretary for Population Affairs Nabers Cabaniss:

> [A]n assumption of compliance is reasonable based on our knowledge of the Title X program as a whole, as the majority of our clinic sites typically do not provide abortions and in which the overall level of involvement in activities such as abortion counseling is not extensive. We also think that many, if not most, of the Title X sites in hospitals may be sufficiently separate to meet the requirements of section 59.9.

Memorandum from Nabers Cabaniss, Deputy Ass't Sec. for Pop. Affairs, to Regional Health Admin'rs (Dec. 8, 1987). Allegations of major upheaval in Title X programs are clearly overblown. In any event, where Congress has declared that Title X programs must keep preventive family planning (permitted in Title X) separate from abortion-related activity (not permitted in Title X), as it did in Section 1008, the will of Congress should be followed.

Finally, Petitioners also seek to expand the amount of funds they claim should be theirs to spend without any Title X restriction. For example, Petitioners Rust et al. argue that patient charges or reimbursement for Title X-funded services should not be governed by Title X rules. Brief of Petitioners Rust et al. at 25 & n.43. This error was also made by the First Circuit, in its opinion on Title X, *Massachusetts v. Secretary of*

Health and Human Serv., 873 F.2d 1528, 1530, 1531 (1st Cir. 1989), which referred to such income as "private[]" funding and "recipient generated income."

The error here is the failure to make the distinction between "private funds" and "program income," which is a distinction found within Department-wide and government-wide public administration statutes, policies, and procedures. *See generally* B. Cappalli, *Federal Grants and Cooperative Agreements* §§1:29, 5:23, 5:24, 5:25, 10:09, 11:01 (1983). Program income is defined as "gross income earned by the grantee from grant-supported activities." *Id.* at §5:24 (quoting OMB definition); 45 CFR 74.42. Thus, any fees paid by clients for Title X-funded services are properly considered public funds subject to Title X grant restrictions. Therefore, Petitioners overreach when they claim that program income, such as client fees generated by Title X services, should not be subject to the restrictions of Title X.

CONCLUSION

For the foregoing reasons, your amici urge that the judgment of the Court of Appeals be affirmed.

Respectfully submitted

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
BRAMES, MCCORMICK, BOPP & ABEL
191 Harding Avenue
P.O. Box 410
Terre Haute, Indiana 47808-0410
(812) 238-2421
Counsel for Amici Curiae

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BRIEF AMICI CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. AND THE CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION IN SUPPORT OF RESPONDENT

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
Brames, McCormick, Bopp & Abel
191 Harding Avenue
P.O. Box 410
Terre Haute, Indiana 47808-0410
(812) 238-2421
Counsel for Amici Curiae

September 7, [illegible]

Graphics Ltd., Indianapolis, IN 46202

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STATEMENT OF THE ISSUE DEALT WITH HEREIN

Do the DHHS regulations which require Title X funded family planning services to be separate from abortion services provided by a grant recipient sufficiently implicate the substantive due process abortion privacy right declared in *Roe v. Wade* so that *Roe v. Wade* should be expressly reconsidered in these cases?

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BRIEF AMICI CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. AND THE CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI[1]

The National Right to Life Committee, Inc. is a nonprofit organization whose purpose is to promote respect for the worth

[1] This brief is filed with permission of all the parties. Letters of permission have been filed with the Clerk of this Court.

and dignity of all human life, including the life of the unborn child from the moment of conception. The National Right to Life Committee, Inc. is comprised of a Board of Directors representing 51 state affiliate organizations and about 3,000 local chapters made up of individuals from every race, denomination, ethnic background, and political belief. It engages in various political, legislative, legal, and educational activities to protect and promote the concept of the sanctity of innocent human life.

The members of the National Right to Life Committee, Inc. have been the prime sponsors of laws restricting abortion on demand to only those instances in which the mother's life is in danger. Since *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), the members of the National Right to Life Committee, Inc. have supported legislation to protect unborn human life within these guidelines. The National Right to Life Committee, Inc. has advocated and encouraged new DHHS regulations to rid Title X funded family planning of the taint of abortion, in compliance with the intent of Congress not to fund programs where abortion is a method of family planning. The National Right to Life Committee, Inc. seeks to advance its interests by supporting the DHHS regulations at issue herein.

The Christian Life Commission of The Southern Baptist Convention is the agency of the Convention charged by the Convention with assisting Southern Baptists in understanding the moral demands of the Christian faith and helping Southern Baptists apply Christian principles to moral and social problems. The Southern Baptist Convention, the nation's largest Protestant denomination, with 38,000 member churches and 14.9 million church members, has assigned the Christian Life Commission of The Southern Baptist Convention the specific task of addressing issues such as abortion.

SUMMARY OF THE ARGUMENT

Roe v. Wade is sufficiently implicated in these cases for this Court to use this occasion to revisit its decision in *Roe v. Wade*. Examination of this Court's latest decisions in abortion cases reveals a reliance on an analysis inimical to that established in *Roe*. Therefore, *Roe* has been *sub silentio* reversed. While this Court has reconsidered and overruled *Roe sub silentio*, this Court's failure to do so expressly has resulted in chaos in the law. The lower courts do not know what standard to apply in reviewing legislation touching on abortion.

This Court has a constitutional duty to provide a reasoned legal justification for its decision, which requires it to expressly reconsider *Roe v. Wade* in these cases. The doctrine of stare decisis does not prevent this Court from performing this duty. Upon express reconsideration, *Roe v. Wade* should be overruled, for there is no fundamental right to abortion under the tests established by this Court for determining fundamental rights.

ARGUMENT

I. *Roe v. Wade* Is Sufficiently Implicated In These Cases to Trigger Express Reconsideration of That Case.

In these cases, the abortion privacy right declared in *Roe v. Wade*, 410 U.S. 113, is at issue.[2] This is clear (1) from the framing of the issues by Petitioners State of New York, et al., (2) from the decision of the First Circuit and other lower courts, which rely on *Roe v. Wade* in striking down these regulations, (3) from the principles employed by this Court in reconsidering precedent, and (4) from the constitutional obligation of this Court to give a sufficient legal rationale for its decisions.

A. Roe v. Wade *Is Implicated in the Framing of the Issues.*

That *Roe v. Wade* is at issue in the cases at bar is evident from the framing of the issues by Petitioners State of New York, et al.. The third issue stated by these Petitioners is:

> Does the regulations' prohibition of abortion counseling and referral in a Title X-funded program violate the woman's constitutionally protected privacy right to make a fully informed decision on whether or not to continue her pregnancy.

Brief of Petitioners at i (Issue 3), *New York et al. v. Sullivan*, No. 89-1392; *cf.* Brief of Petitioners at i (Issue 2), *Rust et al. v. Sullivan*, No. 89-1391.

The key to this issue is the presence or absence of a constitutional abortion privacy right. If there is no fundamental abortion privacy right, then the regulations herein are subject to the rational basis test. If such a right exists, as declared by *Roe*, then strict scrutiny is required. In this way, the standard of review of the regulations is determined.

[2] The abortion privacy right declared by *Roe* was found in the Fourteenth Amendment to the United States Constitution, which applies only to the states. A comparably worded due process clause is found in the Fifth Amendment, which applies to the federal government. The fact that this Court found within the Fourteenth Amendment due process clause an abortion right does not automati cally dictate that one must be found in the Fifth Amendment's liberty clause. The prior decision of this Court in which a distinction could have been made between these two clauses was *Harris v. McRae*, 448 U.S. 297 (1980). In that case, however, the issue was avoided. For present purposes, these two clauses will be treated as equivalent.

B. Roe v. Wade *Is Implicated in the Decisions of Lower Courts Concerning These Regulations.*

The issues of this case have been litigated in several federal jurisdictions. In the decisions of these courts, *Roe v. Wade* has been at issue. Although the Second Circuit found that the right declared in *Roe* was not violated by these regulations, *New York v. Sullivan*, 889 F.2d 401, 410 (2d Cir. 1989), the First Circuit held that the new regulations "constitute[] a government created obstacle in violation of *Roe v. Wade* and its progeny." *Massachusetts v. Secretary of Health and Human Services*, 873 F.2d 1528, 1545 (1st Cir. 1989).

Thus, the reach of *Roe v. Wade*, along with its continued vitality, is clearly at issue in these cases. Indeed, the very fact that this case involves abortion rights implicates *Roe v. Wade*, as discussed below, for there is no fundamental right to abortion without *Roe v. Wade*.

C. Roe v. Wade *Is Sufficiently Implicated for Reconsideration Under the Principles Employed by This Court in* Patterson v. McLean Credit Union.

Where a claimed violation of one's right is asserted, the presence or absence of that right is logically at issue. This precise logic guided this Court in its decision in *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989), to reconsider *Runyon v. McCrary*. 427 U.S. 160 (1976). In *Patterson*, the plaintiff brought an action based upon the statutory right created by an interpretation of 42 U.S.C. § 1981 in *Runyon*, i.e., that § 1981 encompasses a private contract between an employer and employee, and the Court found it appropriate to revisit the case that created that right in such a context.

The rule derivable from *Patterson* is that it is sufficient for reconsideration of a prior case if the right created by the prior case is the basis of the claim in a later case. This common-sense approach normally governs the Court in deciding when reconsideration is appropriate.

However, the majority which decided *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), disagreed over whether and to what extent *Roe v. Wade* should be expressly reconsidered. The failure of a majority to agree to reconsider *Roe* was based upon an analysis contrary to that employed in *Patterson*. The result of this refusal to provide an adequate justification for its decision and thereby to declare what the law is in the area of abortion has left abortion law in chaos.

The abortion privacy right is fairly at issue in this case, and nothing is served by seeking to avoid the issue. Rather, a tremendous disservice would be done to the nation. Distinguishing the degrees of implication of a seminal case — one which creates the right or analysis under which the cause of action arose — is unnecessary. Such a seminal case is always fully implicated in a cause which invokes that right or analysis. Such distinguishing of degrees of implication was not engaged in in *Patterson*, nor is it appropriate under the principle that the decision of all matters necessary to a reasoned justification of the Court's decision — including establishment of the standard of review — is constitutionally necessary.

The result of the failure of the Court to employ a consistent analysis with regard to reconsideration has resulted in turmoil and confusion in abortion jurisprudence, as more fully set forth below. It further resulted in the failure of a majority of the Court to expressly address a decision, *Roe*, which five Justices have declared to be constitutionally flawed. *See, e.g., Roe*, 410 U.S. at 171 (Rehnquist, J. dissenting); *Bolton*, 410 U.S. at 179 (White, Rehnquist, J.J., dissenting); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 452 (1983) (O'Connor, White, Rehnquist, J.J. dissenting); *Webster*, 109 S.Ct. at 3054-58 (Rehnquist, C.J., joined by White and Kennedy, J.J., plurality opinion); *id.* at 3064 (Scalia, J.J., concurring in part and concurring in the judgment).

D. *This Court Has a Duty to Give a Reasoned Legal Justification for Its Decisions.*

"It is emphatically the province *and duty* of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803) (emphasis added). The duty to decide,

when constitutionally required, is illustrated by Justice Marshall in *Marbury*, where he felt compelled, in giving an adequate legal justification for his decision, to comment on matters not necessary to the decision of the case but necessary to a legal justification of the case. He wrote:

> The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a *complete exposition of the principles on which the opinion to be given by the Court is founded.*

Marbury, 1 Cranch at 154 (emphasis added).

To this comment must be added another of Justice Marshall's remarks in the case of *Cohens v. Virginia*, 6 Wheat 264 (1821):

> Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment and conscientiously to *perform our duty.*

Id. at 404 (emphasis added).

The duty of the Court is to provide a sufficient legal justification for its ruling. The standard of review of a law — whether it is the rational basis test or strict scrutiny — is an essential, and therefore unavoidable, part of this Court's legal duty to provide a justification for its ruling. If a prior case has established one standard of review, but the Court is persuaded that the Constitution requires another, the prior case must necessarily be reconsidered; and if found contrary to the Constitution, overruled. Whether a fundamental abortion right exists — and is thereby implicated — determines the standard of review to be employed by the Court. If a prior case declares that such a fundamental right exists, but this Court is persuaded otherwise, the express reconsideration and overruling of that case is required. Only by establishing the presence or absence of a fundamental right, and the analysis derived thereby to be applied to the law at issue, does this Court provide the legal justification for its decision, which the Court is required by the Constitution to do.

The Nation presently needs this Court to clarify the state of abortion law, for, as noted in a later section, the lower courts do not even know what standard of review to apply to abortion cases. This is due to this Court's failure to provide a legal justification for its ruling in *Webster v. Reproductive Health Services*, 109 S.C. 3040, *Hodgson v. Minnesota*, 110 S.Ct. 2926 (1990), and *Ohio v. Akron Center for Reproductive Health*, 110 S.Ct. 2972 (1990). This duty should be fulfilled herein.

II. This Court Has Adopted a Standard of Review in Its Recent Abortion Decisions Which Is Inimical to *Roe v. Wade*.

On June 25, 1990, this Court handed down its latest decisions on abortion. These decisions, *Hodgson v. Minnesota*, and *Ohio v. Akron Center for Reproductive Health*, confirm the radical change in abortion jurisprudence indicated by this Court's decision in *Webster v. Reproductive Health Services*. This Court's decisions in *Hodgson* and *Ohio* demonstrate that a majority of this Court has now abandoned the key underpinning of the *Roe v. Wade* decision — that there is a general "fundamental right to abortion." By so doing, this Court has *sub silentio* overruled *Roe v. Wade*. But the Court has refused to make this clear by expressly reconsidering *Roe*.

The failure of this Court to say expressly what it is doing implicitly and to provide the necessary legal justification has triggered stinging criticism on the Court. Justice Blackmun, writing in his dissent in *Webster*, observed that the plurality has "gone about its business in . . . a deceptive fashion . . . [which] obscures the portent of its analysis." *Webster*, 109 S.Ct. at 3067 (Blackmun, Brennan, Marshall, J.J., concurring in part and dissenting in part). Commentators correctly point out that the *Webster* plurality "eviscerate[d] . . . without explaining what, if anything, was wrong with the decision." Dellinger & Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. Pa. L. Rev. 83, 83-84 (1989). Thus, "[t]he Court's prevailing opinion . . . failed to meet the most minimal standards of sound judicial decisionmaking." *Id.* at 83.

The rationale employed by this Court in *Hodgson* and *Ohio* was dramatically different from that of *Roe v. Wade*. Under *Roe v. Wade*, this Court held that abortion is a fundamental right, meaning that the state must show a compelling state interest to regulate abortion. *See Akron v. Akron Center for Reproductive Health*, 462 U.S. at 420 n.1. The Court created a trimester scheme whereby it recognized a compelling interest in maternal health arising at the end of the first trimester and a compelling interest in "potential" human life arising at fetal viability. *Roe*, 410 U.S. at 162-63. Despite these compelling interests, the task of regulating abortions has proven extremely difficult. *See generally* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 181 (1989).

Prior to *Roe*, abortion was, at most, a "liberty interest" which meant that the state needed only to show a rational basis for any restriction on abortion, because abortion did not enjoy any special constitutional protection. *See Roe*, 410 U.S. at 172-73 (Rehnquist, J., dissenting). Chief Justice Rehnquist and Justice White dissented in *Roe v. Wade* on the grounds that abortion was not a fundamental right but only a liberty interest which was subject to the rational basis test. *Id.*; *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 788-97 (1986) (White, J., dissenting).

In *Webster*, Justice Kennedy joined Chief Justice Rehnquist and Justice White in the plurality opinion which declared that abortion was "a liberty interest protected by the Due Process Clause." *Webster*, 109 S.Ct. at 3058 (plurality opinion) (in contradistinction to a "fundamental right" or "limited fundamental constitutional right").

In *Hodgson* and *Ohio*, Justices Scalia and O'Connor joined with the *Webster* plurality in applying the rational basis test to uphold the Ohio parental notice statute, *Ohio*, 110 S. Ct. at 2977,[3], the Minnesota 48-hour waiting period, *Hodgson*, 110 S.

[3] The plurality employed the rational-basis test explicitly in several passages, *e.g.*, "the Legislature acted in a rational manner;" "It is both rational and fair;" and "The statute in issue here is a rational way to further those ends." *Id.* at 2983-2984.

Ct. at 2960 (Scalia, J., concurring in the judgment in part and dissenting in part); *id.* at 2944 (Stevens, O'Connor, J.J.) (the 48-hour waiting period "*reasonably* further[s] the *legitimate state interest* in ensuring that the minor's decision is knowing and intelligent." (emphasis added)), and the Minnesota two-parent notification requirement with a judicial bypass. *Hodgson*, 110 S. Ct. at 2949 (O'Connor, J., concurring in part and concurring in the judgment in part).

Thus, a new five-member majority has emerged on this Court, prepared to review and uphold abortion statutes under the rational basis test.[5] Because the analysis employed by the new abortion majority in *Hodgson* and *Ohio* (applying the low-level scrutiny) is inimical to *Roe v. Wade* (requiring strict scrutiny), *Roe* has, in fact, been supplanted and is implicitly overruled.

Justice Scalia would have expressly overruled *Roe* in *Webster*, 109 S. Ct. at 3064 (The plurality opinion "effectively

[5] While all members of the new abortion majority agree that there is no general fundamental right to abortion, Justice O'Connor recognizes a limited fundamental right to abortion where restrictions on abortion impose an "undue burden." *Akron*, 462 U.S. at 453. This triggers strict scrutiny in cases where such a burden exists. Justice O'Connor defines as undue those burdens arising from restrictions which impose "absolute obstacles or severe limitations on the abortion decision." *Id.* at 464. Even where there is an undue burden, leading to heightened scrutiny, Justice O'Connor recognizes compelling interests in protecting unborn life and maternal health throughout pregnancy. *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting). These would be sufficient to uphold abortion restrictions, even where an undue burden required strict scrutiny. Justice O'Connor explicitly employed this analysis in *Akron* to vote to uphold a 24-hour waiting period from the time when women received state-prescribed information about abortion and fetal development to the time when they could give consent:

> Assuming arguendo, that any additional costs are such as to impose an undue burden on the abortion decision, the State's compelling interests in maternal physical and mental health and protection of fetal life clearly justify the waiting period. . . . The decision . . . has grave consequences for the fetus, whose life the State has a compelling interest to protect and preserve. '[N]o other [medical] procedure involves the purposeful termination of a potential life.' *Akron*, 462 U.S. at 473-74 (O'Connor, J., dissenting) (citation omitted).

would overrule *Roe v. Wade* [citation omitted]. I think that should be done, but would do it more explicitly."), and then in *Hodgson*, 110 S.Ct. at 2961 ("I continue to dissent from this enterprise of devising an Abortion Code, and from the illusion that we have authority to do so."), and *Ohio*. 110 S. Ct. at 2984 (Scalia, J., concurring) ("The Court should end its disruptive intrusion into . . . [the abortion] field as soon as possible.").

The plurality of Chief Justice Rehnquist, and Justices White and Kennedy, voted to expressly overrule Roe's trimester scheme in *Webster*, 109 S.Ct. at 3056-58 (plurality opinion) (finding that the trimester division is "not found in the text of the Constitution or in any place else one would expect to find a constitutional principle" and that the state's interest in protecting unborn life "if compelling after viability, is equally compelling before viability," (quoting *Thornburgh*, 476 U.S. at 795 (White, J., dissenting)) and, thus, declaring that "[t]o the extent indicated in our opinion, we would modify and narrow *Roe* and succeeding cases."), but avoided *Roe* in *Hodgson* and *Ohio* by finding that these statutes were consistent with *Roe*'s progeny concerning parental notice and consent. 110 S. Ct. at 2978 (citing *Planned Parenthood of Central Missouri v. Danforth; Bellotti v. Baird; H.L. v. Matheson; Planned Parenthood Association of Kansas City, Mo., Inc., v. Ashcroft; Akron v. Akron Center for Reproductive Health, Inc.* (citations omitted)).

Justice O'Connor found "no necessity . . . to reexamine" *Roe* in *Webster*, because the statutes could be upheld under existing precedent, 109 S.Ct. at 3060-61, and in *Hodgson* and *Ohio* because she employed the rational basis test. To the extent that Justice O'Connor was relying upon her "unduly burdensome" test, in *Webster*, *id.* at 3063, she was directly "implicating" *Roe* because this Court in *Akron v. Akron Center for Reproductive Health* had held this test unconstitutional under *Roe*. *Akron*, 462 U.S. at 420 n.1. Furthermore, applying the rational basis test to uphold the *Hodgson* and *Ohio* statutes is clearly contrary to *Roe*, as the dissenters correctly pointed out. *Hodgson*, 110 S. Ct. at 2951; *Ohio*, 110 S. Ct. at 2984.

It is not unusual, however, for this Court to abandon prior precedent without expressly overruling it. Of the 184 cases

identified by the Library of Congress as having overruled prior precedent, it's researchers found that, "[w]hile the Supreme Court sometimes expressly overrules a prior decision, in a great many instances the overruling must be deduced from the principles" of the cases. Congressional Research Service, *The Constitution of the United States, Analysis and Interpretation* 2117-27 & Supp. (1988).

However, the Court's reluctance to say expressly what it is doing implicitly can leave the People, the legislatures, and even the courts uncertain of what course the Court is following. This is compounded when some dissenting Justices disingenously proclaim that "*Roe* remains the law of the land," *Hodgson*, 110 S. Ct. at 2952 (Marshall, J., concurring in part, concurring in the judgment in part, and dissenting in part); *see also Webster*, 109 S.Ct. at 3067 (Blackmun, J., concurring in part and dissenting in part) ("For today, at least, the law of abortion stands undisturbed." *Id.* at 3079.), while finding that the state abortion statutes, upheld by the Court, were unconstitutional under *Roe*. *Roe* clearly does not remain the law of the land.

One looks in vain for even a passing reference to *Roe v. Wade* in any majority opinion in *Hodgson* and *Ohio*. Only in the dissenting opinions of Justice Marshall (joined by Justices Brennan and Blackmun), in *Hodgson*, 110 S. Ct. at 2951, and Justice Blackmun (joined by Justices Brennan and Marshall), in *Ohio*, 110 S. Ct. at 2984, was *Roe v. Wade* even mentioned. In each case, the dissent explicitly reaffirmed *Roe* and applied its analysis to declare unconstitutional all provisions of the Minnesota and Ohio statutes. In these cases, the strict adherents to *Roe v. Wade* and its progeny numbered only three Justices.

The analysis used in *Roe v. Wade* has become virtually irrelevant in deciding abortion cases, because neither the heightened scrutiny employed by *Roe* for reviewing abortion restrictions affecting adult women nor the intermediate scrutiny required under *Roe* for restrictions affecting minors is being applied by the majority of this Court. The new analysis is the rational basis test — as if there is no fundamental right to abortion. Application of this lowest level of constitutional scrutiny to abortion restrictions is in direct contradiction of *Roe*.

III. The Failure of This Court to Fulfill Its Duty to Expressly Declare What the Law Is With Regard to Abortion Has Lead to Chaos in the Law.

The confusion resulting from *Webster* may be seen in the varying interpretations given to the opinion, which run along a spectrum from a *sub silentio* reversal of *Roe*, *see, e.g.*, Dellinger & Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. Pa. L. Rev. 83 (1989); Bopp & Coleson, *What Does* Webster *Mean?*, 138 U. Pa. L. Rev. 157 (1989), to a *sub silentio* reversal of the trimester scheme and the Court's pronouncements in *Akron* and *Thornburgh*, *see, e.g.*, Robertson, *The Future of Early Abortion*, A.B.A. J., Oct. 1989, at 73, to a mere funding case with few other implications. *See, e.g.*, Benshoof, Kolbert, Paltrow & Pine, *Summary and Legal Analysis of* Webster v. Reproductive Health Services, BioLaw U:1497 (1989). In light of such diversity of possibilities, how may the legislatures act? What is permitted?

The significance of this change is in the standard of review now employed by the Court. Viewed as a fundamental right, strict scrutiny is employed and virtually no restriction on abortion is upheld.[6] However, when viewed only as a "liberty interest," as a majority of the Court now does,[7] abortion restrictions must only be rationally related to a legitimate state interest with the result that nearly all restrictions on abortion are constitutional. *See generally* Bopp & Coleson, *What Does* Webster *Mean?*, 138 U. Pa. L. Rev. 157 (1989).

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[6] *See generally* Bopp & Coleson, *What Does* Webster *Mean?*, *supra*. *See also Webster*, 109 S.Ct. at 3068 n. 1 (Blackmun, J., concurring in part and dissenting in part); *Hodgson*, 110 S.Ct. at 2951 (Marshall, J., concurring in part, concurring in the judgment in part, and dissenting in part); *Ohio*, 110 S.Ct. 2984 (Blackmun, J., dissenting).

[7] *Webster*, 109 S.Ct. at 3058 (plurality opinion) (abortion characterized as "a *liberty interest* protected by the Due Process Clause, which we believe it to be." (emphasis added); *Hodgson*, 110 S.Ct. at 2949 (O'Connor, J., concurring in part and concurring in the judgment in part) ("This Court extended that *liberty* interest to minors . . ." (citations omitted) (emphasis added)).

Given that the Court has not stated this change in analysis in express language, will the states feel free to act upon it? The Court's lack of candor in stating expressly what it has done implicitly multiplies confusion in abortion jurisprudence and in the legislatures.

Similarly, the very nature of a woman's interest in choosing abortion is now unexplained. In *Roe*, the Court determined that a woman has a fundamental right to choose abortion, employing a substantive due process analysis. The *Webster* plurality declared that a woman has only a "liberty interest" in abortion under the Due Process Clause of the Fourteenth Amendment. *Webster*, 109 S.Ct. at 3058. Justice O'Connor, with her advocacy of the rational basis standard of review in most cases, agrees that there is no general fundamental right to abortion. *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting). However, where there is an undue burden, she might find a fundamental right, evidenced by her requiring a compelling state interest to justify regulation of abortion in such cases. *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting). Thus, there is now a majority of the Court which no longer believes that there is a general fundamental right to abortion.

In *Akron*, the Court found the unduly burdensome test to be an unconstitutional form of analysis, forbidden by the dictates of *Roe v. Wade* itself. *Akron*, 462 U.S. at 420 n.1. Logically then, any invocation of or reliance upon the unduly burdensome test would be in direct derogation of *Roe*. However, in *Webster*, Justice O'Connor readily relied upon this analysis to uphold the statutes at issue in *Webster* and to declare that all of the Missouri statute could be upheld under prior decisions of the Court, at the same time arguing that no prior abortion decision of the Court was sufficiently implicated for purposes of reconsideration. *Webster*, 109 S.Ct. at 3060. At a very minimum, however, the resurrection of the unduly burdensome test implicated *Akron* because it directly rejected a key holding of that decision.

Is the unduly burdensome test — as the lowest common

denominator of the current majority on abortion issues — the proper analysis to be employed by lower courts and legislatures? If *Akron* is indeed overruled *sub silentio*, is legislation such as that found in *Akron* and in *Thornburgh* now constitutional? This Court's decisions in *Hodgson* and *Ohio* indicate that the answer is yes. In *Hodgson* and *Ohio*, five Justices analyzed and upheld the parental notification statutes under a rational basis standard. *Hodgson*, 110 S.Ct. at 2927; *Ohio*, 110 S.Ct. at 2972. This is a dramatic transformation in the way abortion statutes have been reviewed by the Supreme Court.

A further problem arises if Justice O'Connor's lowest-common-denominator analysis is now the *de facto* analysis for review of abortion legislation. It has been generally thought, since *Roe*, that the fundamental rights analysis required the showing (1) that the state has a compelling interest and (2) that the legislation enacted is narrowly tailored to effect only the compelling interest. *Roe*, 410 U.S. at 155. But Justice O'Connor wrote in *Akron*:

> The Court has never required that state regulation that burdens the abortion decision be 'narrowly tailored' to express only the relevant state interest. In Roe, the Court mentioned 'narrowly drawn' legislative enactments, but the Court never actually adopted this standard in the Roe analysis. In its decision today, the Court fully endorsed the Roe requirement that a burdensome health regulation, or as the Court appears to call it, a 'significant obstacle' be 'reasonably related' to the state compelling interest. The Court recognizes that '[a] state necessarily must have latitude in adopting regulations of general applicability in this sensitive area.'

Akron, 462 U.S. at 467 n.11 (O'Connor, J., dissenting) (citations omitted and case names not italicized in original).

Which standard must abortion legislation now meet — must it be narrowly tailored or rationally related to a compelling interest?

In sum, *Webster*, *Hodgson*, and *Ohio* overturned the abortion jurisprudence established by *Roe*. The very core analysis of *Roe* has been drawn into question: as to the nature of the interest, as to the standard of review, as to the temporal extent of the states' compelling interests, and as to the second prong of the *Roe* analysis for legislation burdening a fundamental right — if indeed, there is yet a fundamental right. The Court has failed to state explicitly what it has done and has not given a reasoned justification for it. This failure alone is a compelling reason why this Court should proceed to perform its constitutional duty to provide such justification, which it avoided in *Webster*, *Hodgson*, and *Ohio*.

Another reason for this Court to proceed to a reconsideration of *Roe* is that the lower courts are already differing widely in their understanding of the standard of review in abortion cases. In *Planned Parenthood v. Minnesota*, 1990 W.L. 108384 (8th Cir. 1990) the Eighth Circuit remarked in its review of a fetal remains disposal statute, "Prior to *Webster*, we believe the statute would have been reviewed under the strict scrutiny standard . . . In *Webster*, however, the Supreme Court appears to have adopted a less rigorous standard of review than the strict scrutiny analysis . . ." *Id.* at 5.

By contrast, the United States District Court for the Territory of Guam made absolutely no mention of *Webster*, *Hodgson*, or *Ohio*, or the views of the current majority of the Justices of this Court in striking Guam's recently enacted abortion law. *Guam Society of Obstetricians et al. v. Ada et al.*, No. 90-00013, slip op. (D. Guam August 23, 1990). Rather, the Guam District Court merely relied on *Roe v. Wade* as if nothing had happened to affect that decision. *Id.* at 14.

The United States District Court for the Eastern District of Pennsylvania did take note of *Webster*, *Hodgson*, and *Ohio* in its recent opinion in *Planned Parenthood of Southeastern Pennsylvania et al. v. Casey et al.*, No. 88-3228, slip op. (E.D. Pa. Aug. 24, 1990). However, it concluded that abortion jurisprudence had not been altered in the least: "For now, at least,

the law of abortion remains undisturbed, because only the United States Supreme Court has the power to change it." *Id.* at 190. Thus the District Court reviewed Pennsylvania's comprehensive abortion legislation under strict scrutiny, requiring the State to show both a compelling state interest for its legislation and that the legislation was "narrowly tailored to the precise compelling interest at stake." *Id.* at 135.

The Pennsylvania District Court reached this conclusion by repeated reliance on the statements of the dissenters in *Webster*, *Hodgson*, and *Ohio* to the effect that *Roe* remained the law of the land. *Id.* at 132 n.29, 136, 138, 190-91. Moreover, the district court strongly advocated *Roe*'s abortion doctrine as proper, contrary to the views of the new majority on this Court concerning abortion, and rejected criticisms of *Roe* by Justices O'Connor and Scalia. *Id.* at 132 n.29, 190-91.

The Pennsylvania District Court opinion highlights in three further ways the need for this Court to make express what it has done implicitly. First, the court set forth a list of lower court decisions which declared that abortion law remained unaltered from the analysis of *Roe*:

> *Lewis v. Pearson Foundation, Inc.*, __F.2d __, __ (slip op. at 5) (8th Cir. July 10, 1990) (*Webster* and *Hodgson* both "recognized the continuing viability of *Roe v. Wade*" and, therefore, *Roe v. Wade* remains controlling); *Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53, 54 (1st Cir. 1990) ("The [*Webster*] Court relied upon and reaffirmed the holdings of *McRae* and *Maher v. Roe* . . . and upheld the validity of *Roe v. Wade*"); *Arnold v. Board of Educ. of Escambia County, Alabama*, 880 F.2d 305, 311 & n.6 (11th Cir. 1989) (reaffirming the principles of *Roe v. Wade* and concluding that *Webster* did not affect its decision); *Florida Women's Clinic, Inc. v. Smith*, No. 79-60603, slip op. at 2 S.D. Fla. Aug. 1, 1990) ("Defendants[']reading of *Webster* is simply wrong. *Webster* did not overrule or modify *Roe*"); *In Re Air Crash Disaster at Detroit Metropolitan Airport on*

> *August 16, 1987*, 747 F. Supp. 427, 429 (E.D. Mich. 1989) ("The *Webster* Court neither overturned *Roe* with respect to viability nor found as a matter of law that viability occurs at twenty weeks").

Id. at 136-37. This demonstrates the resistance of many lower courts to applying the analysis now employed by this Court in abortion cases until this Court explicitly states that the analysis of *Roe v. Wade* no longer applies.

Second, the Pennsylvania district court set forth a statement by this Court assertedly applicable to the state of abortion law, which will be a pattern for many lower courts hostile to the actions of this Court in *Webster*, *Hodgson*, and *Ohio*, as the Pennsylvania district court is. *Id.* at 190-91. These courts will refuse to follow the analysis employed by this Court in recent abortion cases without more express statements of this Court's rationale. This principle asserted by the Pennsylvania district court is that:

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Id. at 129 (quoting *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 109 S.Ct. 1917 (1989)). Although the analysis applied by this Court in the most recent cases should control the analysis employed by lower courts, many lower courts will insist on applying *Roe*'s analysis until this Court makes express what is now implicit.

Third, the Pennsylvania district court struck down legislation which a majority of this Court now clearly would approve, as evidenced by prior opinions and by expressed analysis. For example, the Pennsylvania district court struck down a statute requiring a 24-hour waiting period from the giving of a woman's informed consent to the performance of the abortion. *Id.* at 142-44. The district court declared the issue "identical to

the issue addressed by the Supreme Court in *Akron*." *Id.* at 143. The Pennsylvania court, however, totally ignored the fact that Justice O'Connor, joined by Justices Rehnquist and White, dissented in that case, *Akron*, 462 U.S. at 474, and that Justice Scalia and Kennedy would apparently agree, judging by the analysis employed in opinions they have since authored and joined. Some courts will continue to ignore the law as expressed by a current majority of this Court on abortion issues until these views are set forth in a manner which lower courts cannot avoid.

IV. Stare Decisis Does Not Prevent Reconsideration of *Roe v. Wade* In These Cases.

In his dissent in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932), Justice Brandeis declared the following:

> Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. *But in cases involving the Federal Constitution where correction through legislative action is practically impossible, this Court has often overruled its prior decisions.* The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the sciences, is appropriate also in the judicial function.

Id. at 406-410 (Brandeis, J., dissenting) (emphasis added).[8]

On numerous occasions since *Burnet*, this Court has exercised its liberty to review and reverse its decisions on constitu-

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[8] Justice Brandeis identified 28 instances in which the Court had reversed or qualified its own prior reading of the Constitution. That number has at least tripled in the years since *Burnet*. *See* Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wis. L. Rev. 467, 467.

tional law.[9] The Library of Congress has identified, through 1986, 184 cases in which this Court has reversed its own prior rulings. Congressional Research Service, *The Constitution of the United States, Analysis and Interpretation*, 2115-2127, & Supp. (1987).

However, given the importance of stare decisis in the law, it is appropriate that the Court set forth a reliable standard for determining when reconsideration of precedent is justifiable. This was done recently in *Patterson v. McLean Credit Union*, 109 S.Ct. 2363, which stated:

> Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established. Nonetheless, we have held that 'any departure from the doctrine of *stare decisis* demands special justification.' We have also said that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, *unlike in the context of constitutional interpretation*, the legislative power is implicated, and Congress remains free to alter what we have done.

Id. at 2370 (emphasis added) (citations omitted).

Unlike *Patterson*, reconsideration of *Roe v. Wade* involves constitutional interpretation rather than statutory interpretation. The burden borne in establishing the necessity of reconsideration is therefore diminished.

In *Patterson* the Supreme Court set out three standards, any one of which, if met, constitutes sufficient justification to

[9] Blaustein & Field, *"Overruling" Opinions in the Supreme Court*, 57 Mich. L. Rev. 151, 167, 184-194 (1958) (identifying sixty constitutional law decisions among ninety overrulings of prior Supreme Court decisions).

reconsider a judicial precedent. *Roe v. Wade* meets all three tests and is thus ripe for reconsideration in an appropriate case, such as the case at bar.

The *Patterson* standards are: (1) Whether the precedent has been "undermined by subsequent changes or development in the law;" (2) Whether the precedent is "a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision," or "because the decision poses a direct obstacle to the realization of important objectives embodied in other laws;" or (3) Whether the precedent is "outdated and after being 'tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare.'" *Patterson*, 109 S.Ct. at 2371 (citations omitted). Each of these tests applies positively to *Roe v. Wade*, indicating that reconsideration of that case is appropriate.

First, *Roe* has been undermined by subsequent changes in the law. Contributing to the undermining of *Roe* is the fact that, while claiming to follow *Roe*, the Supreme Court has systematically gutted *Roe* in order to provide for the desired result. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 783 (Burger, C.J., dissenting) ("The extent to which the Court has departed from the limitations expressed in *Roe* is readily apparent."); Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 157, 202-10 (1989). The doctrine of stare decisis presupposes a precedent with content to be followed. By emptying *Roe* of content, any appeal to stare decisis is now an appeal only to the skeletal concept that a woman may have an abortion whenever she desires, for whatever reason.

However, the undermining of *Roe* in the *Roe* progeny takes a secondary place to the important changes heralded by the Court's abortion decisions in *Webster*, *Hodgson*, and *Ohio*. As the changes wrought by this Court in these cases is discussed at length *supra*, it need not be recounted here.

The Court has also recently clarified the fundamental rights analysis and this clarification undermines the fundamental rights analysis in *Roe*. In *Bowers v. Hardwick*, 106 S.Ct. 2841 (1986), this Court, examining the history of state regulation of sodomy, concluded that there was no fundamental right to commit sodomy. The test used in *Bowers* was an historical one, that is, whether such conduct is "deeply rooted in this Nation's history and tradition." 106 S.Ct. at 2844 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (Powell, J., concurring)). Finding that homosexual sodomy had long been regulated by the states, the Court concluded that it did not constitute a fundamental right. *Id.* at 2844-46.

The historical case for the fundamentality of abortion is no more convincing than the historical case for sodomy. The majority in *Roe* relied heavily, and uncritically, on the work of Professor Cyril Means. 410 U.S. at 132-39. Means' history of abortion was neither objective[10] nor accurate. *See* Dellapenna, Brief of the American Academy of Medical Ethics, as *Amicus Curiae*, *Hodgson*, 110 S.Ct. 2926 (No. 88-1309). Had this historical test for fundamentality been scrupulously applied in *Roe*, no right to abortion could have been found. This being true, *Roe* should be revisited.

In *Michael H. v. Gerald D.*, 109 S.Ct. 2333 (1989), this Court considered whether a biological father (who is adulterous) has a constitutional right to visit his child born in an intact marriage. Using the historical test of *Bowers*, this Court held that there is no fundamental right to visitation in such a case, because states have historically presumed that a child born within a marriage is the product of that marriage and rejected visitation claims by adulterous fathers. Both *Michael H.* and *Bowers* reveal that a proposed fundamental right should be framed concretely and narrowly, rather than abstractly and

[10] The majority cited Means seven times during its depiction of the history of abortion — without noting that he was the general counsel of the National Association for the Reform of Abortion Laws (now the National Abortion Rights Action League).

broadly. *See* Bopp & Coleson, Webster *and the Future of Substantive Due Process*, 28 Duq. L. Rev. 271 (1990). Thus, the issue concerning abortion must be whether there is an historically protected and unregulated right to choose abortion, not whether there is an abstract right of privacy and whether one can construe such privacy broadly enough to encompass abortion. Under such a test, no fundamental constitutional right to abortion may be found.

Therefore, *Roe v. Wade* clearly falls within the first *Patterson* test justifying abortion. It likewise falls within the latter two tests. It is, second, "a positive detriment to coherence and consistency in the law" both because of "inherent confusion" in an "unworkable decision" and because it "poses a direct obstacle to the realization of important objectives embodied in other laws." *See generally* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 181 (setting forth at great length the ways in which *Roe* and abortion law are inconsistent with the rest of the law and limits the expanding protection afforded the unborn). Third, *Roe* is outdated in its failure to recognize the scientific evidence for the essential humanity of the unborn, and is contrary to the social welfare. *Id.*

V. Therefore, This Court Should Expressly Reconsider *Roe v. Wade* In These Cases and, Upon Express Reconsideration, Overrule It.

The chaos created by the failure of this Court to say expressly in *Webster*, *Hodgson*, and *Ohio* what it has done implicitly will continue until this Court provides the necessary legal justification for its decisions in recent abortion cases. The decision of this Court in *Roe v. Wade* has proven unsound and is in need of reversal. *See generally* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 181; Bopp & Coleson, Webster *and the Future of Substantive Due Process*, 28 Duq. L. Rev. 271 (1989). The cases at bar are appropriate vehicles, the timing is appropriate, and the need is urgent for reconsideration of *Roe v. Wade*.

Roe v. Wade was intended to settle the issue of abortion in American law. However, *Roe* has proven to be inherently difficult to apply in any consistent and principled manner. This fact is evident in *Roe*'s progeny, which have produced a growing body of intricate and arbitrary, judicially-created regulations surrounding the abortion decision. For example, a state may require second trimester abortions to be performed in clinics, *Simopolous v. Virginia*, 462 U.S. 506 (1983), but may not require that they be performed in hospitals. *Akron*, 462 U.S. at 459. A state may require a physician to assure that certain information be provided to a pregnant woman, *Id.* at 448, but may not require that the doctor himself provide the information. *Id.* at 449. The quantum of information a state may require to be provided has been severely circumscribed. *Thornburgh*, 476 U.S. at 759, 765. Prior to the decision in *Webster*, the Court struck down any meaningful attempt to codify the restrictions allowed in *Roe* and abandoned key elements of the *Roe* formula when convenient. Far from settling the debate, these subsequent decisions have multiplied confusion and spawned further unanswered questions.

Even the dissenting opinions of *Roe* supporters in recent cases demonstrate the inherent confusion created by *Roe*. In *Hodgson* and *Ohio*, three Justices explicitly reaffirmed *Roe* and claimed to apply its analysis to declare unconstitutional all provisions of the Minnesota and Ohio statutes. *Hodgson*, 110 S.Ct. at 2951 (Justice Marshall, with whom Justices Brennan and Blackmun join, concurring in part, concurring in the judgment in part, and dissenting in part); *Ohio*, 110 S.Ct. at 2984 (Justice Blackmun, with whom Justices Brennan and Marshall join, dissenting). While these three Justices vigorously defended *Roe*, Justices Marshall and Blackmun differ dramatically on the standard of review that *Roe* requires. Justice Marshall declared that "[n]either the scope of a woman's privacy right nor the magnitude of a law's burden is diminished because a woman is a minor." *Hodgson*, 110 S.Ct. at 2952. Therefore, "state laws limiting that right [are subject] to the most exacting scrutiny, requiring a State to show that such a

law is narrowly drawn to serve a *compelling interest.*" *Id.* (emphasis added).

Justice Blackmun, on the other hand, claimed that "the Court has recognized that the State 'has somewhat broader authority to regulate the activities of children than of adults,' [but] in doing so, the State nevertheless must demonstrate that there is a '*significant state interest* in conditioning an abortion . . . that is not present in the case of an adult.'" *Ohio*, 110 S.Ct. at 2984 (emphasis in original) (quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74-75 (1976)). Thus, Justice Marshall employed strict scrutiny for minors and Justice Blackmun applied an intermediate standard. Both joined each other's opinion; Justice Brennan joined both opinions. Justice Brennan also joined Justice Steven's opinion, thereby subscribing to three standards of review simultaneously. One is at a loss to understand which analysis is required by *Roe*. Thus, the confusion in the law caused by *Roe v. Wade* is demonstrable from both the majority opinions in *Hodgson* and *Ohio* and the dissenting opinions of those that adhere to *Roe*. This Court needs to explain what the law is with regard to abortion.

CONCLUSION

Under the principles previously employed by this Court, *Roe v. Wade* is sufficiently implicated in these cases to use this occasion to reconsider *Roe v. Wade*. Indeed this Court has a constitutional duty to declare what the law is with regard to abortion and to give a full legal justification for its decisions, including an explanation of the applicable standard of review to be used in abortion cases.

Examination of this Court's latest decisions in abortion cases reveals that *Roe* has already been *sub silentio* reversed by employment of an analysis inimical to *Roe*. However, this Court's failure to expressly reconsider and overrule *Roe* has resulted in chaos in the law. The lower courts are applying different standards of review than the analysis used by this Court in its most recent abortion cases.

Upon reconsideration, *Roe* should be reversed. Employing substantive due process analysis, as it has been recently employed by this Court, and accurately portraying the long history of abortion restriction and regulation in this Nation, precludes any finding of a fundamental abortion right in the Constitution of the United States. Therefore, this Court should fulfill its duty to declare what the law is, and *Roe v. Wade* should be expressly reconsidered and overruled in these cases.

Respectfully submitted,

JAMES BOPP, JR.
Counsel of Record

RICHARD E. COLESON
Brames, McCormick, Bopp & Abel

191 Harding Avenue
PO. Box 410
Terre Haute, Indiana 47808-0410
(812) 238-2421
Counsel for Amici Curiae

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